

UNITED STATES DISTRICT COURT
 WESTERN DISTRICT OF VIRGINIA
 CHARLOTTESVILLE DIVISION

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ELIZABETH SINES, ET AL., * CIVIL ACTION NO. 3:17-cv-72
 * MAY 24, 2018 10:28 A.M.
 Plaintiff, *
 * CHARLOTTESVILLE, VIRGINIA
 vs. * VOLUME 1 OF 1
 *
 JASON KESSLER, ET AL., *
 *
 Defendant. *

* * * * *

TRANSCRIPT OF MOTIONS TO DISMISS
 BEFORE THE HONORABLE NORMAN K. MOON
 UNITED STATES DISTRICT JUDGE

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(Call to Order of the Court at 10:28 a.m.)

THE COURT: Good morning.

I'd ask the clerk to call the case, please.

THE CLERK: Yes, Your Honor. Civil Action

No. 3:17-CV-72, *Elizabeth Sines, and others, versus Jason*

1 *Kessler, and others.*

2 THE COURT: Plaintiffs ready?

3 MS. KAPLAN: We are, Your Honor.

4 THE COURT: Defendants ready?

5 MR. KOLENICH: Yes, Your Honor.

6 THE COURT: All right. Thank you. We're here on the
7 defendants' motions. And we are only to determine here --
8 this argument is over whether the pleadings are sufficient to
9 state a cause of action against the defendants. There will be
10 no evidence, of course. And I've given you a rough schedule
11 of, you know, how much time allotted.

12 But, remember, this is -- the argument is for my
13 benefit to try to help me understand what the case is about,
14 not necessarily for your benefit. So if we need to, we'll
15 bury that. It's not written in stone.

16 But do remember, we have looked at the briefs very
17 carefully. So it's not necessary to just repeat what's in
18 your brief.

19 All right. Who is going to argue first for the
20 defendant?

21 MR. KOLENICH: Good morning, Your Honor.

22 THE COURT: Good morning.

23 MR. KOLENICH: Sir, my name is Jim Kolenich. I'm
24 admitted pro hac vice from Ohio. I represent Jason Kessler,
25 Christopher Cantwell, Vanguard America, Robert Ray, Nathan

1 Damigo, Elliot Kline, Identity Evropa, Matthew Heimbach,
2 Matthew Parrott, the Traditionalist Worker Party, Jeff Schoep,
3 National Socialist Movement, Nationalist Front. All those
4 defendants have filed a motion to dismiss this complaint for
5 failure to state a claim.

6 The central argument of our motion, Your Honor, is
7 that the plaintiffs have failed to establish the elements of a
8 conspiracy either under federal or state law.

9 The plaintiffs rely heavily on a good amount of
10 conclusory allegations, such as that are highlighted in our
11 brief, with a very few specific factual allegations thrown in.
12 But what they mostly rely on -- and it is good lawyering.
13 There's no denying that -- is that they've taken a conspiracy
14 to show up in Charlottesville for a political rally and,
15 because violence happened at that rally, tried to turn it into
16 a conspiracy to commit violence, specifically racial violence
17 in violation of Section 1985, the Thirteenth Amendment in
18 Section 1982.

19 Now, in support of this allegation, they bring forth
20 numerous Internet communications, blog postings stating crude
21 things, uncivilized things, impolite things, offensive things,
22 and also stating outlandish and implausible things, such as
23 alleging that there's a chemical that can be deployed that
24 will dissolve a man on the spot leaving nothing but bones
25 laying there. This, of course, is hypobole. No such chemical

1 exists. Such as bringing forth a blog post that lists
2 fictional farm equipment that can be used to run over
3 pedestrians who are blocking traffic. No such equipment
4 exists.

5 They wish to use this, apparently -- I guess they'll
6 speak for themselves, but it seems to me they wish to use this
7 to establish the element of a plan, a preexisting plan, a
8 conspiracy to commit that type of violence with equipment that
9 does exist. Obviously, vehicles exist. Mace exists. Bats,
10 sticks, fists, those all exist. But what's lacking in their
11 complaint, 112 pages of it and 56 pages of supporting brief is
12 any preexisting conspiracy to actually perpetrate this
13 violence.

14 Undoubtedly, some violence occurred. Undoubtedly,
15 some violence that exceeded the limits of the law occurred at
16 the rally. And the state courts have determined that certain
17 rally participants are guilty of crimes related to that
18 violence. But what is not apparent from the face of the
19 complaint is that there was a preexisting agreement to engage
20 in that violence.

21 If I could, Your Honor, since you've allotted me a
22 good amount of time, I would like to go over some of the
23 specific paragraphs that the plaintiffs have cited in their
24 supporting brief claiming that they have established the
25 elements of a conspiracy.

1 Excuse me, Your Honor.

2 The plaintiff directs us to Paragraph 37 and 39 of
3 their amended complaint as to Defendant Jeff Schoep. I'm
4 having some technical difficulties here, Your Honor. If you'd
5 give me one minute.

6 THE COURT: Okay.

7 MR. KOLENICH: The plaintiff was kind enough to give
8 me a hard copy, Your Honor. We can proceed.

9 Paragraph 37 and 39 of the amended complaint. They
10 say that this is part of their case against Jeff Schoep.
11 "Defendant Schoep, a resident of Michigan, is the leader of
12 Defendant National Socialist Movement, the largest neo-Nazi
13 coalition in the United States. On April 22, 2016, Schoep
14 formed the Aryan Nationalist Alliance, later renamed the
15 Nationalist Front, which is an umbrella organization of hate
16 groups such as TWP, the Aryan Terror Brigade, regional
17 factions of the Ku Klux Klan. Schoep has said if he could
18 meet Adolf Hitler today, he would say, 'Thank you'" and
19 various other kind things about Hitler.

20 And he tweeted after the events in Charlottesville,
21 "It was an honor to stand with you all in C'ville this
22 weekend." Various groups and the rest are true warriors.

23 Moving to Paragraph 38. "Defendant National
24 Socialist Movement is an unincorporated association." It goes
25 on to say it maintains business in Michigan.

1 And Paragraph 39, Nationalist Front is an
2 unincorporated association maintaining a website. Their
3 complaint goes on and on like that. And I realize those are
4 introductory paragraphs identifying a defendant, but it is
5 heavy on paragraphs just like that.

6 There is no specific allegation in those paragraphs
7 that says Schoep or the NSM or anybody else engaged in any
8 conspiracy to do anything except go to Charlottesville for a
9 political rally.

10 Now, where -- later on, let's go -- they cite us to
11 paragraph -- we'll go further -- 187 and 188. 187, "On
12 August 12" -- this is under a heading "Defendants
13 Intentionally Planned a Violent Confrontation with
14 Counter-Protesters."

15 "On August 12, defendants, their co-conspirators and
16 others" -- although it's either defendants and their
17 co-conspirators. I don't know what others might be there,
18 "acting at their direction executed their plan to carry out
19 racial, religious, and ethnic violence, intimidation, and
20 harassment."

21 (Court reporter asked for clarification.)

22 MR. KOLENICH: "Defendants Kessler, Cantwell, Mosley,
23 Heimbach, Hill, Invictus, Ray, Spencer, Damigo, Peinovich,
24 Fields, Parrott, Tubbs, Nationalist Front, all the defendants
25 who were there all participated in violent events of the day."

1 Now, that paragraph adds nothing. It's a conclusory
2 paragraph. It doesn't say what they did or didn't do, where
3 their agreement is. It doesn't add anything.

4 Okay. They are going to say that's an introductory
5 paragraph to a section.

6 Moving on. 188. "Defendants and co-conspirators
7 planned to arrive early and anticipated and encouraged the use
8 of violence to assist the rally." Now, they put a quote in
9 here. "As one co-conspirator explained: 'Me, the rest of
10 TWP, League of the South have been to more than one rodeo.
11 And shit NSM will be there early too. Those guys are nuts in
12 a good way.' Defendant Kessler promised there would be
13 hundreds of members of TWP and League of the South at the
14 park."

15 Again, colorful language, but where is there evidence
16 of a conspiracy or an agreement to do anything except show up
17 at the park?

18 It doesn't even -- if you take -- as you must -- if
19 you take the plaintiff's allegations in each of these
20 paragraphs in the best possible light, it doesn't allege that
21 they've ever been responsible for violence at any of their
22 prior political rallies. It merely alleges that they got into
23 fights. That's not sufficient to sustain a conspiracy
24 allegation here.

25 They specifically sued the defendants for planning to

1 come to Charlottesville and physically assault with racial
2 animosity, not merely physically assault but for racial and
3 religious reasons the local citizens or at least the local
4 counterprotesters. They have to have proof of an a priori
5 agreement to do that.

6 Now, they've a lot of proof -- and we'll just concede
7 for purposes of this motion, Your Honor, that these guys knew
8 each other and had an opportunity to communicate with each
9 other prior to coming to Charlottesville. They certainly had
10 an opportunity to conspire. We're not denying that. The
11 question is did they conspire? Is there sufficient allegation
12 that they conspired?

13 They came to Charlottesville. They knew each other.
14 They planned to come to Charlottesville, but where is the
15 allegation they planned to engage in racial violence?

16 They say a lot of racial things on the Internet.
17 They came to Charlottesville to chant and say a lot of racial
18 things. Yes, they did. But the Skokie, Illinois, case may
19 explain that that doesn't matter. You can't sue over that.

20 If in the 1970s in Skokie, Illinois, you can't
21 actually wear a replica Nazi uniform, fly Nazi flags through a
22 predominantly Jewish community, and if that's First Amendment
23 protected speech, then saying the same kind and doing the same
24 kind of things today, you know, that case hasn't been
25 overruled. Perhaps the Court will have a different look at

1 it, but you are running up against existing precedence if you
2 say that's not First Amendment protected speech.

3 So they need more. And they try to give them more
4 because violence occurred, but they need a preexisting
5 conspiracy. Not to show up and offend people, not to show up
6 and yell at people, not to show up and look offensive,
7 ridiculous, however they want to characterize it, scary. They
8 need a preexisting condition to actually physically attack
9 people or otherwise impede their rights in a colorable,
10 actionable way. They don't have it. They want to say that
11 because it happened they must have conspired ahead of time.

12 Now, the leading case or at least a case from the
13 Western District, *Frazier v. Cooke*, which is cited in our
14 brief, was a case where there were two men, white men sitting
15 on a porch, a black man across the street playing basketball.
16 The white man said some racially insensitive comments. One of
17 the black men comes across the street onto the white man's
18 property and says, you shouldn't talk like that, you shouldn't
19 say that.

20 The allegation there was that the two white men
21 looked at each other and then in concert stood up, got off the
22 porch and beat the black man up there on the white people's
23 front yard. That stated a claim for 1985 conspiracy.

24 So we must admit and we do that the conspiracy can
25 happen in an instant, right there in the moment. But they

1 have to have agreement, as is plain from the cases cited in
2 our brief, from each member of the conspiracy in order to hold
3 them liable.

4 So if there's ten men on that porch and only two of
5 them look at each other and get up and go beat up the black
6 man, the other eight haven't conspired to exist in a 1985
7 conspiracy.

8 Even if they all think that it's funny, the racially
9 insensitive language or insulting language is funny, there's
10 no 1985 conspiracy. They have to take action to do that.

11 Now, the vast majority and in some cases all of the
12 allegations against some of my clients are that they conspired
13 to go to Charlottesville. That's it. They went to
14 Charlottesville to have a rally.

15 Yes, they are provocative people. Yes, they have a
16 far-right political ideology. Yes, they carried torches.
17 While carrying those torches, the plaintiffs have alleged that
18 certain plaintiffs were physically assaulted.

19 I have two things to say about that. One is
20 plausibility. We live in an era -- you know, since Ashcroft
21 and Iqbal, plausibility is mandatory. They have alleged that
22 lighter fluid was thrown on the people, followed by lit
23 torches, and yet nothing catches on fire. I don't know how we
24 are going to test that here in court. Bring in a grill or
25 something and see how that works? But if lighter fluid and a

1 torch is thrown on somebody, something should catch on fire.
2 That allegation in and of itself is implausible, we will
3 submit to the court.

4 Secondarily, there were hundreds of people at this
5 torch rally, according to their complaint. Limiting ourselves
6 to the universe of our complaint as we must, there were
7 hundreds of people carrying torches at this rally. Only a
8 couple, and none of my clients, are alleged to have assaulted
9 people with the torches and the lighter fluid.

10 So going back to Frazier and Cooke, if there's ten
11 people on that porch and only two of them look at each other,
12 step off the porch and assault a racial minority, if the other
13 eight haven't conspired, then they don't have a sufficient
14 allegation of a conspiracy against all the people carrying
15 torches. Only the people who actually physically assaulted
16 plaintiffs have engaged in a conspiracy that was agreed upon
17 there in the moment.

18 Moving to the next day, the actual August 12 rally,
19 they want to say that there's a conspiracy to do violence
20 because certain of the Internet postings by organizers, some
21 of my clients, Mr. Kessler, Mr. Cantwell, stated bring signs,
22 bring sign posts because you can use that if things get
23 violent. They want you to reach the conclusion that that
24 means they planned to use the sign posts and other implements
25 for purposes of committing racial violence, but it doesn't say

1 that. That's not a reasonable implication from that.

2 They were going to a political rally. Of course
3 they're going to have signs. They're going to have posts.
4 They're going to be chanting. They need to show that there
5 was a conspiracy beforehand to use that stuff for violent
6 acts.

7 Now, maybe somewhere in that complaint that I haven't
8 found they've got that agreement there in the moment where two
9 guys are, like, all right, let's charge over there. You know,
10 the melee starts and two guys decide to jump in, as happened
11 with some of the criminal convictions. A melee started. Some
12 other guys jumped in, and they ended up convicted of crimes.

13 We're not arguing that that's not possible. We're
14 not arguing that you should dismiss a claim if they've shown
15 that. I just can't find it. Maybe I didn't carefully enough
16 read 160-whatever pages, but they're arguing that all this
17 stuff was planned out ahead of time. In fact, they used this
18 language for months and months and months ahead of time, the
19 alt-right marchers came here planning to assault people, to
20 racially assault people.

21 They do have a specific allegation against one of my
22 clients, Robert Ray, that he verbally berated somebody while
23 standing next to men carrying AR-15 rifles -- or I'm sorry.
24 They used the phrase "rifles." I don't think they specified
25 the kind -- outside of a synagogue, but that allegation is

1 deficient. It doesn't say that they knew it was a synagogue
2 or Mr. Ray knew it was a synagogue. It has somebody
3 screaming, there's the synagogue. It doesn't say that Ray
4 knew or that he heard that person screaming. It doesn't say
5 that he harassed anybody in an anti-Semitic way. It says he
6 specifically referenced the phrase "white sharia," which is,
7 if anything, an anti-Muslim phrase or an anti-feminist phrase.
8 It's certainly not an anti-Semitic phrase, at least not until
9 this case.

10 It doesn't say that he attacked anybody. It doesn't
11 say that he swung at anybody. It doesn't say that he pointed
12 a gun at anybody, threw a rock, nothing. Just ran his mouth
13 while wearing anti-Semitic language on his shirt. I can't
14 remember what the language is, but we'll concede that it's
15 anti-Semitic.

16 Again, if all you're doing is marching and using
17 language, provocative and insulting though it may be, the
18 Skokie case precludes saying that's actionable. It's First
19 Amendment protected speech, however much it may be a problem
20 for people witnessing the speech, however scared certain
21 people might get having to witness that speech.

22 Now, in the Skokie case itself, the judges there, you
23 know, said that, you know, if they're coming back every day
24 with this stuff, maybe that presents a different case. If
25 they're coming back frequently maybe it presents a different

1 case. But once or once a year, we don't have any choice but
2 to allow it. It's speech. It's political speech, and it's
3 protected by the First Amendment, however afraid certain
4 residents might be of it and of the people using it.

5 So it is our contention in this motion that that is
6 all the plaintiffs have brought to this court. They have
7 brought no a priori or preexisting conspiracy to do violence,
8 but rather there's a conspiracy to come to Charlottesville and
9 be provocative in their political speech which is protected.

10 We are not arguing that the First Amendment protects
11 violence or that the Second Amendment protects criminal
12 violence. Certainly not. We're not arguing that you're
13 allowed to bring a gun to a political rally and then point it
14 at people, no, or use it to intimidate people, no.

15 What we are arguing is that torches, chants, raising
16 your voice, all of that goes along with a political rally, and
17 it is not actionable. It is First Amendment protected speech.

18 And to the extent that they had any 1985 conspiracy
19 in this complaint drawn from the Thirteenth Amendment from
20 1982, wherever, it is a spur-of-the-moment conspiracy between
21 limited numbers of people, none of which are my clients.
22 Everything they've got against my clients is before they got
23 to Charlottesville. And it's all protected by the First
24 Amendment.

25 They do have state law claims, state law conspiracy

1 and then a state law racial harassment statute. And they have
2 problems there as well.

3 As to my clients, you know, the only person that they
4 said racially harassed somebody or religiously harassed
5 somebody was a plaintiff, Wispelwey. And Wispelwey claims
6 that he was assaulted by a defendant named Augustus Invictus.
7 It's not one of my clients. It doesn't say that one of my
8 clients was standing there agreeing with Invictus to do this.
9 And it specifically doesn't have any allegations that there
10 was an a priori agreement to hunt down Plaintiff Wispelway or
11 anybody else and harass them face to face. That's not what
12 was agreed to. That's not what was discussed. There's no
13 discussion beforehand, an allegation of a discussion
14 beforehand in the complaint to go hunt down the synagogue or
15 hunt down a reverend and harass them on the street or anywhere
16 else.

17 That's not to say that the plaintiffs weren't worried
18 about being assaulted. They may well have been, but they
19 weren't. And the fact that the defendants are scary-looking
20 individuals saying and doing scary-looking things isn't the
21 same thing as assaultive behavior. And however worried they
22 may have been doesn't transform it into a 1985 conspiracy.

23 Again, back to Frazier and Cooke. Had the two looked
24 at each other, stepped off the porch and walked past the black
25 man, is there a conspiracy? Even though he was nervous he was

1 going to get hit, we would submit to the court no.

2 Now, as to the Virginia law, their complaint as to
3 the Virginia conspiracy is heavy on Section 18 of the Virginia
4 code, the criminal code. Now, Virginia law based on the
5 Vansant case we've cited doesn't automatically allow a civil
6 cause of action for violations of a criminal statute.

7 The plaintiffs in arguing against that point cite to
8 a case called BellSouth. It's in their pleading. That says
9 that a civil cause of action will lie but only if you -- and
10 it states -- the case is explicit -- if you injure the
11 plaintiff in their trade or business. And none of these
12 plaintiffs, to my knowledge as I stand here, have argued that
13 they were injured in their trade or business. They would
14 argue that they were personally injured.

15 So their argument is off base. Virginia law does not
16 allow civil liability in these circumstances for violations of
17 a criminal statute. And that's what their Virginia conspiracy
18 is about, violations of criminal statutes, causing a riot and
19 so forth.

20 As to their racial and religious harassment state law
21 claim, again they just had Augustus Invictus. They don't
22 bring my clients into it.

23 They do mention the presence of some of my clients at
24 the torchlight rally. But, again, they don't say -- and they
25 know who my clients are. They've obviously sued my clients.

1 They've identified my clients. Their clients have identified
2 my clients, but they specifically do not say that any of my
3 clients who were at the torchlight rally threw any lighter
4 fluid, threw any torches or any such thing and, importantly,
5 conspired to do any such thing.

6 Now, there is the business about mace, people being
7 maced. But again, which of my clients agree with somebody
8 else to mace the participants? That is deficient in this
9 complaint, the First Amendment complaint.

10 So I hope that it's clear what our argument is. It
11 is a defect in their conspiratorial arguments as well as state
12 law defects, and that is what we wish to present to the Court.

13 THE COURT: Thank you.

14 MR. KOLENICH: Thank you, Your Honor.

15 THE COURT: All right.

16 MR. JONES: Good morning, Your Honor. My name is
17 Bryan Jones. I'm representing League of the South, Michael
18 Hill, and Michael Tubbs.

19 To survive a 12(b)(6) motion, plaintiffs must allege
20 sufficient facts to nudge a claim beyond being merely
21 conceivable, to be plausible. And conclusory legal statements
22 are not enough.

23 In their memorandum of law in support of their motion
24 in opposition to our motion to dismiss, plaintiffs list on
25 page 30 all of the instances where my three clients are named

1 in their -- in the complaint. There are 24 paragraphs where
2 my clients are listed in the complaint.

3 What is just as important as what is listed is what
4 is missing from their complaint. Plaintiffs allege that much
5 of this conspiracy was planned online using platforms such as
6 Discord. Plaintiffs have obtained numerous communications on
7 Discord between participants at the rally and some of the
8 defendants.

9 None of my clients are alleged in the complaint to
10 have made any actual statements on Discord. There are no
11 agreements from my clients to commit any acts, no agreements
12 even to do anything, no statements whatsoever on Discord.

13 The facts in the plaintiffs' complaint merely allege
14 that --

15 THE COURT: Who has access to Discord? Who has it?
16 I mean, can anyone access Discord?

17 MR. JONES: I don't know if that's alleged in the
18 complaint, but it is alleged in the complaint and we must
19 accept as true the League of the South had a Discord channel,
20 but there's no allegation that any of communications --

21 THE COURT: I'm just curious. Could someone not,
22 say, associated with one of the defendants post anything on
23 Discord?

24 MR. JONES: I'm not sure, Your Honor. It's my
25 understanding that you have to be invited onto Discord, onto

1 the specific channels.

2 So the facts in the complaint simply allege that my
3 clients participated in the rally on August 12. There is no
4 specific allegations that they were present on August 11,
5 before that.

6 The allegations are that they marched in formation
7 from the parking garage to the park, that Michael Hill's name
8 was on the poster, that after the rally he tweeted, "League of
9 the South had a good day in Charlottesville. Our warriors
10 acquitted themselves as men. God be praised."

11 There's allegations that there was some scuffling
12 between Michael Tubbs and some of the counterprotesters. No
13 allegation that that was a violation of those
14 counterprotest -- no names or none of the plaintiffs are
15 alleged to have been any of those counterprotesters.

16 So we have a similar argument, Your Honor, that this
17 is alleged to be a conspiracy. They don't have facts to
18 support sufficiently carrying the claims beyond merely
19 conceivable to plausible.

20 They've been able to infiltrate the secret
21 communications between the parties, but they have not been
22 able to plead specific facts against my three clients, Your
23 Honor.

24 That would be my initial argument. Thank you.

25 THE COURT: Thank you, sir.

1 All right.

2 MR. DiNUCCI: Good morning, Your Honor. My name is
3 John DiNucci. I represent Mr. Spencer. Just entered an
4 appearance yesterday. Pleasure to be here, Your Honor.

5 If I can raise two points, which candidly I have not
6 seen in any of the defendants' motion, memorandum of points in
7 authorities.

8 There is a request in the case for injunctive relief.
9 But from my quick and dirty reading of the complaint, after
10 several quick and dirty readings, I don't see any facts
11 pleaded that would entitle the plaintiffs to injunction of any
12 sort. None whatsoever.

13 Secondly, and very briefly again -- this too was not
14 in any of the briefs that I've seen -- I would argue that the
15 plaintiffs who seek punitive damages haven't pleaded the
16 requisite facts to get punitive damages. Although there's
17 language about racial animus and the like, I don't see any of
18 the boilerplate standard allegations that one would make to
19 get punitive damages. There's nothing about hatred, spite,
20 malice. There's certainly no such allegation made about my
21 client, Mr. Spencer. So I would suggest that both the prayers
22 for relief should be stricken with respect to the conspiracy
23 allegations, which seem to be the heart of the matter.

24 I'm referring to several cases from the Western
25 District as well from the Fourth Circuit. The *Muhammad v.*

1 *Taylor* case, which was decided by Judge Kiser in 2017, I
2 quote, "Allegations of 'parallel conduct and a bare assertion
3 of a conspiracy' are not enough for a conspiracy claim to
4 proceed," citing *Society Without a Name v. Virginia*, 655 F.3d
5 342.

6 The *Weathers v. Ebert* case involving Mr. Ebert, a
7 commonwealth's attorney from Prince William County dismissing
8 a conspiracy claim, and I quote, "The other allegations are
9 only general statements that he," Mr. Ebert, "acted in concert
10 with others. These" -- and this is the key -- "unsupported by
11 averments of communication, consultation, cooperation, or
12 command, do not make him responsible under 1983 for the acts
13 of others."

14 Averments of communication, consultation, cooperation
15 or command, which allegations are not made in this case. And
16 I'll get to some of the illustrative paragraphs in a moment.

17 And then going back to the *Society Without a Name v.*
18 *Virginia* case, 1985(3) claims dismissed. The court saying, I
19 quote, "The complaint fails to allege with any specificity the
20 persons who agreed to the alleged conspiracy, the specific
21 communications amongst the conspirators, or the manner in
22 which any such communications were made." That's the
23 framework.

24 The complaint does not sufficiently allege
25 communications, consultations, commands by Mr. Spencer or for

1 that matter, I suppose, any of the other defendants.

2 As an example, Paragraph 64, and I quote, "Defendant
3 Spencer and co-conspirator Evan McLaren, a member of Defendant
4 Identity Evropa, met in person at the Trump Hotel in
5 Washington, D.C., to organize and direct the 'rally' in
6 Charlottesville, with the purpose and result of committing
7 acts of violence, intimidation, and harassment against
8 citizens of Charlottesville."

9 With the purpose and result, but there's nothing said
10 in that paragraph about what the communications were. What
11 did these gentlemen say? These are purely conclusory
12 allegations not based on any pleaded fact.

13 Paragraph 230, "Defendants Spencer and Peinovich" --
14 if I pronounce that correctly -- "spoke to their followers at
15 McIntire Park. Peinovich" -- if I pronounce that correctly --
16 "called the counterprotesters savages."

17 There's nothing about what Mr. Spencer allegedly said
18 there, assuming he was there. It has to be taken as truth of
19 the matter he was there. Nothing about what he said. Nothing
20 about communication he had with Mr. Peinovich or anybody else.

21 Paragraph 315. "Defendant Spencer and
22 co-conspirators McLaren met in person to plan unlawful acts of
23 violence, intimidation, and denial of equal protection for the
24 Unite the Right events."

25 Again, no allegation of what was said. It's talking

1 about to plan to do something. And, in fact, in those
2 paragraphs I'm quoting from, they don't say they actually came
3 to a conclusion on a plan.

4 Then they cite various what I'll call anodyne
5 statements by Mr. Spencer that don't amount to incitement of
6 violence and don't evidence -- they actually don't constitute
7 a direct communication with any other alleged co-conspirator
8 and don't amount in and of themselves to conspiracy.

9 Paragraph 52. This is Mr. Spencer. "What brings us
10 together is that we are white, we are a people. We will not
11 be replaced." That's not evidence of a conspiracy. That's
12 not communication with another individual to plan something.
13 It's not urging anyone to act or agree to act. It's not an
14 incitement to violence.

15 Paragraph 85. And I may garble this one. I can't
16 read my own writing, Your Honor. "A 'Charlottesville
17 Statement' was distributed by Defendant Spencer, setting out
18 the philosophy and ideology underlying the rally." And it
19 quotes it.

20 It indicates that Mr. Spencer went on to say,
21 "Racially or ethically defined states are legitimate and
22 necessary." That's not a communication with another alleged
23 co-conspirator designed to create an agreement. He's just
24 making a public statement.

25 Paragraph 120, and this was after the events started

1 to occur on Saturday. "Defendants" -- I believe it was
2 Saturday. "Defendant Spencer put out a call for attorneys on
3 his website, altright.com." And that's not, again, a direct
4 communication with any of the other alleged co-conspirators.
5 It's certainly not an incitement to violence. He's saying
6 people may need legal counsel given what's going on.

7 Paragraph 141. "Defendant Spencer tweeted a picture
8 of Commonwealth Restaurant, which had a sign in the window
9 reading, 'If quality and diversity aren't for you, then
10 neither are we.'"

11 Now, the plaintiffs in the following paragraph, 142,
12 try to suggest that somehow that was an invitation for people
13 to wreak havoc on, vandalize, I suppose, that restaurant or
14 perhaps others. But that's not -- actually, that's after the
15 conspiracy had been performed. As other counsel said, you've
16 got to have a prior agreement that results in these acts.
17 That's not an indication of any prior agreement.

18 If I read the complaint correctly, what it consists
19 of primarily where it talks about alleged acts or
20 communications to conspire, they're collective allegations
21 about the defendants. They don't specifically say Mr. Spencer
22 said this, communicated with this guy, or the same is true as
23 to other defendants.

24 Paragraph 68. "Defendants also frequently
25 coordinated the illegal acts planned for the Unite the Right

1 event online." It doesn't say Mr. Spencer. "They made use of
2 websites, social media, including Twitter, Facebook, 4chan,
3 8chan" -- I don't know what those are -- "chat rooms, radio,
4 videos, and podcasts to communicate with each other and their
5 co-conspirators, followers and other attendees and did so to
6 plan the intended acts of violence and intimidation, and the
7 denial to citizens of equal protection of law."

8 It doesn't mention Mr. Spencer. It doesn't say
9 Mr. Spencer engaged in any particular communication. That's
10 not specificity to support a conspiracy claim. And they don't
11 identify in that paragraph the actual communications they're
12 taking about.

13 Paragraph 71, "One Internet tool defendants used
14 extensively" -- and defendants collectively, not identifying
15 Mr. Spencer or anybody else.

16 "One Internet tool defendants used extensively to
17 plan and direct illegal acts was the chat platform Discord."
18 No reference to Mr. Spencer. Nowhere in the complaint is
19 there indication that Mr. Spencer had access to that platform,
20 if that's the right word, or actually utilized it. No
21 allegation whatsoever.

22 And if I recall the brief that the plaintiffs have
23 submitted for purposes of this hearing, they indicate that
24 that was the principal means by which the defendants allegedly
25 communicated to form this alleged conspiracy. The principal

1 means, but no reference to Mr. Spencer as to accessing the
2 Discord platform.

3 Paragraph 72. "Defendants" -- again defendants
4 collectively -- "used Discord as a tool to promote,
5 coordinate, and organize the Unite the Right rally, and as a
6 means to communicate and coordinate violent and illegal
7 activities in secret during the actual events of that
8 weekend."

9 No reference to Mr. Spencer. Just a collective
10 allegation. If there is evidence to support the claim here,
11 it would be in there. Why don't they say Mr. Spencer did
12 these things?

13 And that's important because if you go to
14 Paragraph 74, there's a technique used in this complaint I
15 want to point out. It says, "Individuals including Heimbach,
16 Parrott, Cantwell, and Ray, were all participants in Discord,
17 and participated in the direction, planning, and inciting of
18 unlawful and violent acts through Discord."

19 Individual defendants including the three or four
20 people. I can't count. No mention of Mr. Spencer. Doesn't
21 say including Mr. Spencer. By definition that means he wasn't
22 part of it, because if he was they would have said so. If
23 they had evidence, they would have said so. They haven't
24 pleaded he was part of any communication through Discord.

25 Same thing in Paragraph 97: "On Discord, moderated

1 and controlled by Defendants Kessler and Mosley, there were
2 countless exhortations to violence, including," and then it
3 goes on.

4 "Moderated and controlled by Defendants Kessler and
5 Mosley." Doesn't say moderated and controlled by Defendant
6 Spencer. Doesn't say Defendant Spencer accessed, used,
7 participated in the use of Discord.

8 There's other such references with the word
9 "including." Paragraph 102, actually it is a little bit
10 different, Your Honor. Paragraph 102, "Co-conspirators on
11 Discord incited attendees to bring weapons and engage in
12 violence. The incitement was known to and promoted by
13 defendants." But again, no reference to Mr. Spencer. No
14 reference to Mr. Spencer.

15 How then can they say he is part of this conspiracy?
16 They don't plead any -- really don't plead any communications
17 by Mr. Spencer. And then to the extent they in a general
18 fashion talk about communications, they don't mention
19 Mr. Spencer. They're just collective allegations about
20 defendants.

21 In short, there is not any -- there is no sufficient
22 allegation of communication, consultation, cooperation, or
23 command by Mr. Spencer. They don't allege -- they don't
24 sufficiently alleged he is part of a conspiracy.

25 With respect to -- and the same problem, of course, I

1 would respectfully submit, infects, if you will, their civil
2 conspiracy claim under Virginia law. They simply haven't
3 pleaded the necessary communications or the like to indicate
4 he was part of a conspiracy.

5 THE COURT: Is there any difference in whether it be
6 a civil conspiracy or a criminal conspiracy? Not him, but in
7 the law is there any difference in a civil and a criminal
8 conspiracy?

9 MR. DiNUCCI: Other than with respect to burden of
10 proof, I would think not. But I'll be blunt, Your Honor. I
11 wasn't prepared for that question. I've just gotten in this
12 case. But the simple fact is -- well, they -- for whatever
13 purpose, they have simply not pleaded facts. This, as counsel
14 has pointed out, are purely conclusory.

15 THE COURT: I understand that. But, I mean, we try
16 these drug cases. There's people acting all over everywhere,
17 and no one has said a word that they can convict 20 or 30
18 people in a drug conspiracy with nothing but actions.

19 MR. DiNUCCI: Understood. I mean, I understand the
20 concept.

21 THE COURT: Well, I understand the law in these cases
22 is you have to be pretty specific about what was said and
23 done, but I was just asking.

24 MR. DiNUCCI: Well, if the theory is that there was
25 of a tacit conspiracy or implied conspiracy, I would

1 respectfully submit that at least logically you still have to
2 have some communication with the other alleged
3 co-conspirators. It may just be a wink and a nod. I think
4 the example -- I get your name butchered, but other counsel
5 mentioned was an instant conspiracy between a couple of guys
6 on a porch to go beat up a black man. It could be a wink and
7 a nod, but they don't even allege a wink and a nod here. We
8 don't have anything specific.

9 On 8.01-42, the Virginia civil harassment statute,
10 there's no -- at least I don't remember seeing any allegation
11 of any particular act by Mr. Spencer. There's again just a
12 collective allegation that four or five defendants
13 collectively, you know, violated the statute. They don't say
14 what act of harassment, particular act of harassment against
15 what particular individual Mr. Spencer engaged in.

16 The same. They don't allege any particular act of
17 violence by Mr. Spencer against any particular individual.
18 We're left to guess what they're talking about. And they
19 certainly don't allege any vandalism of property by
20 Mr. Spencer, which is the third component of the Virginia
21 civil harassment statute.

22 I also would -- I guess I have to confess my
23 ignorance here. I'm having a hard time defining exactly what
24 legal theory beyond conspiracy as a general proposition the
25 plaintiffs advance.

1 They -- in the complaint at, for example,
2 Paragraph 60, 65 through 68, 315 through 322, 324 through 326,
3 and 341, the plaintiffs allude to a deprivation of a right to
4 equal protection. Yet, nowhere in the complaint do the
5 plaintiffs suggest, indicate, allege that there was any state
6 action.

7 So I would respectfully submit under -- not only
8 Breckenridge but then the Carpenter case, and then the Bray
9 case -- since the plaintiffs haven't pleaded any state action,
10 they don't have any claim for violation of equal protection of
11 the law.

12 They also talk about in Paragraphs 312 and 341
13 deprivation of the equal privileges and immunities of
14 citizenship. But with one exception highlighted in the
15 plaintiffs' brief, which is a discussion of the applicability
16 of 1982 to incidents around the synagogue, they don't cite
17 what privilege or immunity they're talking about. We are left
18 to guess what the claim is about.

19 They don't identify any statute or principle of law
20 that creates or constitutes a privilege or immunity of which
21 they were deprived.

22 In one paragraph, 339, they say they were deprived of
23 equal rights, but they don't tell us, in the complaint at
24 least, what those equal rights were, again with the exception
25 of 1982.

1 They also in Paragraph 342 and only in Paragraph 342
2 of the complaint reference the right to be free of the badges
3 and incidents of slavery. And I'm going to address that with
4 the Court's indulgence in a moment.

5 They also talk about in Paragraph 312 being deprived
6 of the use, benefits and privilege of property and/or
7 contractual relationships. Put aside the word "property."
8 There is no allegations that anybody was deprived of use,
9 benefits and privilege of contractual relationships.

10 Judge, if I read the brief correctly, they're saying
11 that the principal claims seem to be -- or set of claims seems
12 to be based on the Thirteenth Amendment.

13 As I understand the law, and these -- again, I will
14 be candid only having gotten in this case -- I've seen issues
15 that weren't necessarily addressed in other briefs. I've got
16 copies of cases over here for both plaintiffs' counsel and the
17 Court.

18 Is I understand it, the Thirteenth Amendment --
19 excuse me. 1985(3) creates a remedy -- a remedy -- if persons
20 conspire to deprive a protected person of some right that is
21 declared elsewhere such as in the constitution or a statute.
22 One of the plaintiff's cases, *U.S. v. Bledsoe*, 728 F.2d 1094
23 stands for that proposition.

24 Great American Federal Savings & Loan Association v.
25 Novotny, 442 U.S. 366 at page 372 referring to 1985(3), it

1 merely provides a remedy for violation of rights it
2 designates. 1985(3), quote, "Provides a civil cause of action
3 when some otherwise defined federal right" -- not state right
4 -- "to equal protection of the laws or equal privileges and
5 immunities under the laws is breached by a conspiracy."
6 That's Novotny at 366.

7 Also, as I read again Breckenridge, Carpenter, Scott
8 and to Bray, with limited exceptions 1985(3) does not apply to
9 private conspiracies to deprive persons of rights. That's
10 *United Brotherhood of Carpenters and Joiners of America, Local*
11 *610, v. Scott*, 463 U.S. 825.

12 That was a case in which people were alleging a
13 deprivation of First Amendment rights, but there was no
14 allegation of a state action.

15 The same principle, though, applies with conspiracy
16 to deprive persons of the right to equal protection under the
17 Fourteenth Amendment. If there's no state action, there's no
18 claim. There's *Wong v. Stripling*, 881 F.2d 200, Fifth
19 Circuit, 1983, in which case there was a dismissal of claims
20 for deprivation of rights under the First and Fourteenth
21 Amendments for equal protection because there was no state
22 action. And the Fifth Circuit was relying on Scott in that
23 case.

24 And then we have *Tilton v. Richardson*, 6 F.3d 683, a
25 Tenth Circuit case from 1993 affirming a dismissal of a

1 1985(3) claim by conspiracy to deprive the plaintiff of rights
2 under the First and Fifth Amendments applicable to the
3 Fourteenth Amendment, the Court holding that absent state
4 involvement, plaintiff did not have an actionable claim for
5 deprivation of the First Amendment right, right to freedom of
6 religion -- excuse me, Your Honor -- due process, right to
7 fair and impartial trial.

8 *Federer v. Gephardt*, 363 F.3d 754, an Eighth Circuit
9 case affirming the dismissal of a 1985(3) claim for a
10 conspiracy to deprive of rights to freedom, association, and
11 speech holding that state action is necessary because the
12 First and Fourteenth Amendments only apply to action by a
13 governmental actor.

14 And then we move to be to *Bray*, again concedes that
15 there are instances in which a 1985(3) claim can exist against
16 a private actor. The court there said there were a few rights
17 that are enforceable, if you will, as against the private
18 entity. The court said those rights are the only Thirteenth
19 Amendment right to be free from involuntary servitude.
20 There's no allegation of involuntary servitude being forced on
21 anybody here.

22 And in the same Thirteenth Amendment context,
23 interstate travel, there was no allegation in this case that
24 anybody was deprived of the right to interstate travel. In
25 other words, 1985(3) doesn't apply because there is just no

1 state action, and there is none of the prohibitive private
2 action. I will get to badges of incidents in a moment, Your
3 Honor.

4 Also in support of the proposition that in these
5 circumstances there is no -- without state action there's no
6 1985(3) claim. *Park v. City of Atlanta*, 120 F.3rd 1157,
7 Eleventh Circuit case from 1997, in which the Court said,
8 among other things -- I think the point is applicable here --
9 1985(3) doesn't create any general federal tort remedy.

10 Now, with respect to the Thirteenth Amendment, I
11 acknowledge -- I have read Breckenridge and still have a
12 little bit of difficulty digesting it. But as I understand it
13 given other cases, some prior to Breckenridge and some after,
14 the Thirteenth Amendment does give congress the authority to
15 determine what are badges and incidents of slavery. That's
16 the *Jones v. Alfred H. Mayer* case, 392 U.S. 400 which
17 plaintiffs cite. And I think it's Section 2 of the Thirteenth
18 Amendment gives the congress the power in Section 2 to enact
19 legislation to implement the Thirteenth Amendment. And it's
20 been construed to, again, allow the congress to enact statutes,
21 such as 1982, to ban imposition of badges of incidents of
22 slavery, but the Thirteenth Amendment itself doesn't create a
23 private cause of action, I guess with the limited exceptions
24 of circumstances in Breckenridge, although I would try to
25 distinguish that.

1 In support of the proposition that the Thirteenth
2 Amendment does not create a right of action, *Goss v. Stream*
3 *Global Services, Inc.*, a case from the Northern District of
4 Iowa from March 19, 2015. Again, I have copies. There is no
5 official cite I have been able to find for that.

6 The only right the Thirteenth Amendment creates on
7 its face is the right to be free of involuntary servitude. We
8 mentioned *Wong v. Stripling* before, a Fifth Circuit case.
9 That stands for the proposition that the Thirteenth Amendment
10 does not create a right to be free from private racial
11 discrimination in all areas of life.

12 In the *NAACP v. Hunt*, 891 F.2d 1555, an Eleventh
13 Circuit case from 1990, the court said the Thirteenth
14 Amendment in and of itself doesn't forbid badges and incidents
15 of slavery. There has to be some implementing legislation
16 such as 1982 that would prohibit imposition of badges and
17 incidents of slavery.

18 In the *City of Memphis v. Greene*, 451 U.S. 100, the
19 Supreme Court noted that it had not ruled on the issue of
20 whether the Thirteenth Amendment itself executed, but it went
21 on in that case to form, I believe, a dismissal of the case
22 concerning a certain allegation of the badge and incident of
23 slavery because there was no statute to say what the defendant
24 was accused of was wrong, was prohibited.

25 In *Palmer v. Thompson*, 403 U.S. 217, the Supreme

1 Court said -- that's a 1971 case. The Court doesn't have a
2 authority to declare, legislate, and in quotes,
3 "implementation," that is to identify badges of slavery.

4 THE COURT: You've used about 20 minutes. You've got
5 10 for rebuttal, if you want to go on and use some of that
6 time.

7 MR. DiNUCCI: I would like to, Your Honor. I
8 appreciate the Court's indulgence.

9 What we have here, Judge, is no citation in the
10 complaint to any implementing statute other than 1982. So to
11 the extent that 1982 is invoked in this case, if you will,
12 it's on behalf of Ms. Pearce, I believe, one of the Jewish
13 plaintiffs because of her allegation that her ability to
14 exercise access to use of the synagogue was restricted. Put
15 that aside for a minute. There's no other implementing
16 statute that the plaintiffs cite or rely on.

17 I would argue then there is no Thirteenth Amendment
18 claim that any plaintiff has except perhaps Ms. Pearce. So I
19 don't know what's in the complaint. What is the cause of
20 action? I would suggest there is no cause of action because
21 we don't have an implementing statute cited with respect to a
22 Thirteenth Amendment claim, and we don't have state action.
23 At least with respect to the federal claims, there's no meat
24 there. There's no substance there.

25 And briefly, with respect to Ms. Pearce's claim, I

1 would respectfully submit that the cases she cites, the Greer
2 case and the Brown case, are inapposite.

3 I think one of the counsel used the phrase in
4 describing what happened with respect to the synagogue as a
5 one-off matter. This isn't a continuing thing. It wasn't a
6 question of vandalism, which I believe was the case in Greer.
7 In Greer, for example, a 1982 claim was upheld with respect to
8 the synagogue, deprivation of rights to use the synagogue,
9 people were shooting live ammunition into the synagogue. We
10 don't have anything like that here. In fact, there is nothing
11 pleaded that I recall seeing where Ms. Pearce actually had
12 been unable to use the synagogue. She's been inconvenienced,
13 but I would respectfully submit not in the Greer or Brown
14 cases the plaintiffs cite indicates that you have a cause of
15 action of somehow your schedule has been changed. And that's
16 about all we have alleged in the complaint.

17 With respect to 1986, Your Honor, as I understand the
18 law, what you have to allege is not only that there has
19 been -- well, you have to allege that the defendant knew of an
20 act about to be committed in furtherance of a conspiracy, an
21 act about to be committed and that you had the means
22 reasonably to prevent the commission of the act.

23 It's not a question of knowing there's a conspiracy
24 and bringing it into the conspiracy. The law is you know the
25 act about to be committed in furtherance of a conspiracy and

1 you fail when you could to interfere and to stop that act.

2 *Buck v. Board of Elections of City of New York*,
3 536 F.2d 522, a Second Circuit case from 1976. Knowledge of
4 the acts is a statutory prerequisite to sue. Not knowledge of
5 the conspiracy. Knowledge of the act and implementation of
6 the conspiracy.

7 In the Second Circuit case, the Court cited *Hampton*
8 *v. City of Chicago*, 484 F.2d 602, a Seventh Circuit case from
9 1973. Quote, "Liability under 1986, however, is dependent
10 upon proof of actual knowledge by a defendant of the wrongful
11 conduct of its subordinates."

12 Conduct, act, not existence of a conspiracy. It's
13 the act that you have an -- that you know of and have an
14 opportunity to prevent. There's no allegation here in this
15 complaint that Mr. Spencer knew of any particular act of
16 violence or other criminal conduct in which any other
17 defendant or unnamed co-conspirator engaged. And there's no
18 allegation that he could have prevented it.

19 For example, where is the allegation that Mr. Spencer
20 knew about what Mr. Fields was going to do? And where's the
21 allegation that Mr. Spencer, or for that matter any other
22 defendant could have prevented somebody from getting in his
23 car and running somebody down? We have no such allegations.

24 Mr. Spencer has not been -- there's no specific
25 incident of misconduct that's been identified that Mr. Spencer

1 was aware of or could have prevented.

2 One last case, *Bell v. City of Milwaukee*, 746 F.2d
3 1205, a Seventh Circuit case from 1984. Section 1986
4 predicates liability on: One, knowledge that any of the
5 conspiratorial wrongs are about to be committed. Wrong is as
6 an act. It's not the conspiracy itself.

7 Two, power to prevent or to aid in preventing the
8 commission of those wrongs. Neglect to do so. And where the
9 wrongs were committed -- five, the wrongful acts. Acts could
10 have been prevented by reasonable diligence. Acts. Not that
11 you could have stopped the conspiracy, not that you should
12 have never gotten into conspiracy, the alleged conspiracy, but
13 that once the conspiracy was formed and acts were being
14 committed in implementation of it, you knew what those acts
15 were, you were there and you could have prevented them. No
16 such allegations in the complaint.

17 Thank you. Your Honor.

18 THE COURT: Thank you. All right.

19 MR. PEINOVICH: May it please the Court, Your Honor.
20 I'm Michael Peinovich. I am a defendant myself, pro se, sir.

21 THE COURT: Yes, sir.

22 MR. PEINOVICH: I'm a political podcast server,
23 commentator, activist from New York, and it's well known that
24 I'm a controversial speaker, often called dogmatic speaker, I
25 have many opinions that many people may find offensive,

1 shocking and such like that. Nonetheless, I am -- my belief
2 is that I'm the kind of person for which the First Amendment
3 was designed.

4 And in this allegation, in this complaint by the
5 plaintiffs here, I would like to point out I have a broadly
6 similar argument that has already been stated, that the facts
7 alleged do not amount to -- do not amount to survive a motion
8 to dismiss.

9 And I would like to point out specifically where I am
10 mentioned in this -- this is a full complaint, 335 paragraphs
11 of allegations in here, and I am mentioned in only 14 of them.
12 And much like Defendant Spencer when it comes to the Discord
13 server on which the plaintiffs claim the primary planning for
14 this rally was conducted, there are no allegations of any
15 comments or any participation on my part in that server
16 because no such allegation could be made.

17 I am mentioned in a number of paragraphs but only 14.
18 And I'd like to call attention to some of those.

19 So in Paragraph 42, the plaintiffs introduce me.
20 They describe who I am and what I do. They say that I have
21 appeared at several other political events alongside Defendant
22 Spencer, and that is true. Defendant Spencer and I have done
23 many political events together.

24 There is no allegation that there was any violence or
25 allegations of violence that have arisen from any of these

1 other events that we have appeared at together.

2 They also say in this paragraph that Defendant
3 Spencer and myself spoke at McIntire Park August 12, 2017.
4 And they say, quote, "In the immediate aftermath of the car
5 attack." And there's no allegation that I had any knowledge
6 of the car attack or any involvement in it whatsoever. They
7 merely include this, in my opinion, in an attempt to draw the
8 implication in the mind of the reader that there was some
9 connection between my appearance in McIntire Park and the
10 incident, which they have no allegation that I knew anything
11 about, which is the car accident involving Mr. Fields.

12 Paragraphs 50, 52, plaintiffs talk about how I took
13 part in a May 13, 2017, demonstration in Charlottesville with
14 Defendant Spencer, with Defendant Damigo, among others. They
15 talk about how we had lunch and we spoke at a pavilion.
16 Again, this is just -- I mean, I wonder why would they even
17 include that? There's no actionable behavior there.

18 Paragraph 96, which is also going to be used in this
19 exhibit that they have, is an excerpted quotation of an
20 off-colored joke which they allege appeared on my podcast. Of
21 course, they're not giving -- they say it was said by a
22 co-conspirator. They don't name the co-conspirator. They
23 simply allege that this person was a co-conspirator without
24 naming them. There's no indication of who this person is
25 anywhere else in the complaint.

1 Now, while there is certainly an off-colored joke
2 that some might find offensive, there's no date, there's no
3 time stamp, there's no episode name, there's no link, there's
4 no indication that this joke has anything whatsoever to do
5 with the rally at all. And it's my belief that they
6 deliberately omitted those because to give the full context of
7 such quotation would show how absurd it is to include it in an
8 allegation that would indicate any kind of a conspiracy.

9 Certainly there's off-colored jokes that appear on my
10 podcast, but again nothing here would indicate knowledge or
11 communication or intent of anything relating to the events of
12 August 12, whatsoever.

13 Now, in Paragraph 141 they include a tweet. If you
14 will allow me, this tweet is deliberately misconstrued in
15 their complaint to indicate this is a threat against residents
16 of Charlottesville. It is exactly the opposite. It is a
17 warning to them of the possibility of violence from
18 counterprotesters who, you know, attended with the expressed
19 intent of disrupting the events. So this is a deliberate
20 misconstruction of my intent with that tweet.

21 So in Paragraph 207, they described that I approached
22 Lee Park or Emancipation Park with my security team. This is
23 true. I approached the park with a couple of friends of mine
24 who were there to watch my back in case of trouble.

25 Now, there's no allegation of violence by myself or

1 my conspiracy -- excuse me. The word "conspiracy" has been
2 thrown around so much that I accidentally said it -- my
3 security team. There's no allegations that we engaged in
4 violence. There's no allegations that we witnessed violence.
5 There's no allegations that we were armed. There's nothing.

6 They said we approached the park. And now we
7 approached the park for a legally permitted rally, which, you
8 know, reminds me that this court had actually enjoined the
9 City of Charlottesville to hold the rally. The City of
10 Charlottesville attempted to revoke it. This court said,
11 sorry, these guys have First Amendment rights. You have to
12 allow them to speak.

13 So I was approaching the park with the intent to
14 speak. There's no allegation of anything else. Simply I
15 approached the park.

16 Paragraph 229. They allege that Defendant Spencer
17 and I regrouped in McIntire Park after evacuating Lee Park.
18 They then say that, quote, "Violence broke out again." Once
19 again, I would say this is a carefully worded sort of
20 equivocal statement meant to draw a connection between this
21 alleged violence and my appearance there at McIntire Park;
22 however, there's no direct allegation that I had any knowledge
23 of this violence or that I was involved in this alleged
24 violence any way.

25 They simply included it there hoping to draw the

1 inference in your mind that there is some connection, but they
2 don't directly allege it because they can't. They can't
3 directly allege that.

4 Now, in Paragraph 230 they say that in my remarks at
5 McIntire Park I described the counterprotesters at the rally
6 as savages. This is true. However, I believe since they have
7 raised the issue of my remarks at McIntire Park, I can
8 supplement them with other remarks I made there in the same
9 speech. And I have included the full remarks and a video in
10 my motion to dismiss, but if you will allow me a few words.

11 So I introduced my remarks at McIntire Park by saying
12 this is not a rally about hate. This is not a rally against
13 any other group of people. This is a rally for ourselves.
14 And in my closing statement I said this is about love; this is
15 not about hate. We love ourselves. We love our people. We
16 love our nation. We love Europe, and we love America. We
17 love white people, and there's nothing wrong with that.

18 Now, certainly some people might find such statements
19 offensive. You know, I can't imagine why but they might.
20 These are First Amendment protected speech, and I certainly
21 don't see how this can be construed as a communication or
22 incitement to violence or some other such thing. They are
23 words indicating love and support for a certain group of
24 people, not attacks on any other group of people.

25 Other factual allegations that they make about me in

1 the complaint are similarly innocuous. I had a guest on my
2 podcast who announced the event, again legally permitted
3 event. I assisted Defendant Cantwell in fundraising while he
4 was in jail. I appeared on a poster for the event. Again,
5 this is just First Amendment stuff.

6 So my argument is broadly similar, that all the facts
7 alleged in this complaint do not suffice to indicate a
8 conspiracy that would survive a motion to dismiss on these
9 matters.

10 And that's all I have, your Honor. Thank you very
11 much.

12 THE COURT: Thank you. That's all then for the
13 defendants, I believe.

14 Do you need a break before you start?

15 MS. KAPLAN: Just five minutes, Your Honor, if that
16 would be okay.

17 THE COURT: Okay.

18 MS. KAPLAN: Thank you. We appreciate that.

19 THE MARSHAL: All rise.

20 (Recess taken from 11:30 a.m. until 11:39 a.m.)

21 THE COURT: You may proceed.

22 MS. KAPLAN: Yes. Good morning, Your Honor. I'm
23 Roberta Kaplan, counsel with my colleagues for the plaintiffs.
24 And I'm going to argue why we believe all the motions to
25 dismiss should be denied in their entirety.

1 As an initial matter, Your Honor, plaintiffs are
2 obviously sensitive to the fact that Your Honor, the people
3 who work in this courthouse, the people who live in this
4 community have their own connections to, recollections of, and
5 personal experiences of what happened in Charlottesville last
6 summer.

7 Defendants too, as we know, have their own views
8 about what took place. But we're here today on motions to
9 dismiss plaintiffs' first amended complaint. And like with
10 any motion to dismiss, the allegations of the complaint must
11 be taken as true, and all inferences should be drawn in
12 plaintiffs' favor.

13 Let me start, Your Honor, if a may, with a
14 housekeeping notes, a couple of housekeeping matters. First
15 of all, Defendant Fields did not move to dismiss at all. So
16 he is in the case no matter what. He had answered the
17 complaint.

18 In addition, six defendants, including Andrew Anglin,
19 Moonbase Holdings and others have defaulted. So they too have
20 not filed motions to dismiss. That leaves seven defendants in
21 the case who have filed motions to dismiss, and I will try to
22 focus on them and their arguments today.

23 Essentially, Your Honor, we believe -- and if you
24 could turn to page 2 in the kind of slide thing that we did,
25 PowerPoint without a PowerPoint, we believe that the

1 defendants essentially made four arguments or their arguments
2 can be divided into four broad categories:

3 First, that the plaintiffs have not adequately
4 pleaded a Section 1985(3) conspiracy claim.

5 Two -- and you heard a lot of this already this
6 morning -- that particular defendants should not have been
7 named as defendants.

8 Three, that the court should accept, rather than
9 plaintiffs' interpretation of the facts, defendants'
10 interpretation of the facts alleged by plaintiffs.

11 And, four, that all of this is protected speech so
12 that no civil liability can lie in any event.

13 If it's okay with you, Your Honor, what I would like
14 to do is I'm going to address the first three of those
15 arguments. And then my colleague, Karen Dunn, from the Boies
16 Schiller firm will address the fourth, which is the
17 constitutional arguments.

18 THE COURT: All right.

19 MS. KAPLAN: I'm going to start with 1985(3). Well,
20 slide three has the claims in the case, which are 1985(3),
21 1986, common law conspiracy, and violation of Virginia Code
22 8.01-42.1, but I'm going to go directly into 1985(3).

23 And if you could turn, Your Honor, if you would to
24 slide five which has the history and language of Section 1985.
25 As we all know, Section 1985(3) was passed by the reconstruct

1 in congress as a significant part -- and this is what Justice
2 Kennedy said just last year -- as a significant part of the
3 civil rights legislation passed in the aftermath of the Civil
4 War. The statute is known as the Ku Klux Klan Act. It was
5 passed in response to widespread violence and acts of terror
6 directed at blacks and their supporters -- crucial fact -- and
7 their supporters in the postwar South.

8 Against this backdrop of political terrorism,
9 Congress enacted Section 1985(3), affording a remedy for the
10 vindication of the civil rights of those being threatened and
11 injured, notably blacks and advocates for their cause.

12 I'll get to this later, Your Honor, but it's very
13 crucial. Section 1985(3) is not limited to acts just about
14 African-Americans, or subsequent cases have held Jews. It
15 also imposes liability for acts of violence and threats and
16 intimidation against supporters of their cause.

17 So I'm going to start with the elements of the claim,
18 which are on slide six, Your Honor. There are five elements.
19 This comes from one of your own court's decisions. The five
20 elements are a conspiracy of two or more persons:

21 Two, who are motivated by a specific class-based,
22 invidiously discriminatory animus.

23 Three, to deprive the plaintiff of the equal
24 enjoyment of rights secured by the law.

25 Four, which results in injury.

1 And, five, as a consequence of an overt act committed
2 by the defendants in connection with the conspiracy.

3 So I'm just going to do it element by element kind of
4 the old-fashioned way, if that's okay. And I'm going to start
5 with the conspiracy element.

6 First thing I want to say at the outset, Your
7 Honor -- and it addresses the question you have already
8 asked -- is the elements of a conspiracy for purposes of
9 Section 1985(3) are essentially the same whether it's state
10 law, federal law, common law or even criminal law.

11 There's a slight difference with criminal law in the
12 sense that in the criminal context, the agreement, the
13 conspiracy itself is what's criminal. And you don't have to
14 show injury the way you do in a civil case. But for all
15 intents and purposes of what we're talking about, the
16 essential elements and ideas of what constitutes a conspiracy
17 are the same.

18 So to plead a conspiracy, Your Honor, you have to
19 show facts supporting a plausible inference -- and we
20 certainly agree with Iqbal and Twombly that it has to be a
21 plausible inference -- that defendants positively or tacitly
22 came to a mutual understanding to try to accomplish a common
23 and unlawful plan.

24 And although this requires allegations that are more
25 than parallel conduct -- again citing directly from Twombly --

1 it does not require there to be direct evidence of a meeting
2 of the minds.

3 And frequently in Section 1985 claims -- and I think,
4 Your Honor, I read -- I think I read practically every 1985(3)
5 case you yourself decided -- it is true that routinely these
6 claims get dismissed. And they get dismissed because
7 frequently when plaintiffs bring these allegations, either
8 they don't show -- they allege a conspiracy in a conclusory
9 manner, as you have held many times, or they don't show
10 sufficient evidence of discriminatory animus. And here we
11 think both of those are amply met.

12 So if you can look at Paragraph 7, staying with the
13 conspiracy, it gives Your Honor I think a sense of the kinds
14 of claims that routinely get dismissed. There's a citing
15 without a name that we've already heard reference to which was
16 whether the relocation of a homeless center outside of the
17 city violated Section 1985(3).

18 There's attempts to convert what would be an ordinary
19 unlawful search and seizure into 1985(3). That's the second
20 case, *Smith v. McCarthy*. And then also in a criminal-related
21 context there have been attempts to argue that
22 misidentification of a plaintiff as a drug dealer violated
23 Section 1985(3). And courts routinely dismiss those claims,
24 as you yourself have, because allegations are conclusory and
25 because there's not enough showing or allegation of a

1 conspiracy.

2 But this case, Your Honor, I would respectfully
3 submit is very different from those cases. And it is very
4 much more like became the cases I have on the right side of
5 that column which really go to the heart or the core of what
6 1985(3) was about.

7 There's the *Griffin v. Breckenridge* case, Your Honor,
8 in which some people were stopped in Mississippi believing
9 that they were civil rights workers and were beaten up. And
10 that's the case, as you know, where the court made very clear
11 that state action is not required to make a 1985(3) claim.

12 There's the Waller case which involved an anti-Klan
13 rally in which there was violence.

14 And then there's the Bergman case, also another
15 Freedom Riders case which involved injury to Freedom Riders
16 traveling in the South.

17 Here we believe that the core of our allegations in
18 the case bring this case not even closer to the cases on the
19 right side of the column but squarely within the right side of
20 the column.

21 And, in fact, there's a slide later here in which the
22 Supreme Court in *Griffin* said this case -- if this case
23 doesn't represent the core of what congress intended in
24 Section 1985(3), it's hard to imagine what does.

25 And I would say that the exact same principle is true

1 here, Your Honor. We are talking about racially motivated
2 violence as the result of a carefully Klan planned conspiracy
3 with people who showed their animus with massive --
4 particularized allegations which I'll get into on the
5 conspiracy -- obviously harm to plaintiff, obviously overt
6 acts.

7 So on the conspiracy, let me tell you that -- before
8 I get there, the defendants seem to be suggesting that the
9 only kind of conspiracy that would be sufficient here or that
10 is sufficient under the law is if all the defendants somehow
11 got into a room on one particular occasion and agreed on
12 exactly what the conspiracy was. But that's not true. We all
13 know that not to be true, your Honor.

14 Yourself talked about a drug conspiracy which in
15 certain ways is analogous here where it's agreed that certain
16 people in the conspiracy are the hub and do the planning and
17 coordinate and maybe get the profits, and other persons in the
18 conspiracy who may not even know each other are the spoke,
19 although here we don't have that issue because all the
20 defendants, we will show, did have contact with each other
21 prior to August 11.

22 But among the kinds of things that we allege, we
23 allege that defendants met in person to organize the events of
24 August 11 and 12th.

25 THE COURT: Let me go back to 1983, 1985(3), and just

1 ask you to comment on this case, the Second Circuit case, *ALMA*
2 *Society, Inc., v. Mellon*. And in that case it said the Court,
3 referring to the Supreme Court, has never held that the
4 amendment itself unaided by legislation as it is here reaches
5 the badges and incidents of slavery, as well as the actual
6 conditions of slavery and involuntary servitude. Indeed, all
7 indications are to the contrary. And so is there a
8 freestanding right to be free of the badges and incidents of
9 slavery involved in this case?

10 MS. KAPLAN: There is, Your Honor. The courts have
11 held interpreting the Thirteenth Amendment most frequently in
12 the context of upholding the constitutionality of hate crimes
13 statutes, like the Matthew Shepard Act and acts like that have
14 specifically held -- and we cite the cases in our brief --
15 that racially motivated violence in and of itself is a badge
16 and incident of slavery. And there's no question that's what
17 happened here, Your Honor.

18 So, yes. It doesn't happen all that much, but this
19 is exactly the kind of badge and incident case that the
20 Supreme Court was talking about in *Griffin*.

21 THE COURT: Well, in *Griffin*, though, they did find
22 that there was a violation of their right to traveling.

23 MS. KAPLAN: Correct. They said both travel -- they
24 were clear. It was the travel, and there was the badges of
25 incidents under the Thirteenth Amendment.

1 Here I'm not alleging travel, although I would say
2 that some of the incidents have an aspect of detention to
3 them. In particular, Friday night when our clients were
4 surrounded by hundreds of protesters with lit torches and
5 could not leave from around that the Jefferson statute, that
6 has elements of detention. Same with the synagogue. Same
7 with the church on Friday night.

8 I'm not saying it's interstate travel. It's not, but
9 it gets to kind of the core of what badges and incidents of
10 slavery were all about. And again, we have those cases cited
11 that say racially motivated violence is enough.

12 So getting back, Your Honor, to the things that we
13 allege the defendants did. They met in person.

14 To respond to something that was said by one of my
15 friends on the other side, of course we don't know exactly
16 what they said at their meetings. They were secret meetings.
17 That's why we are going to get discovery to find out what they
18 said.

19 We cite the Hill case in our brief that says
20 conspiracies often by their very nature are secret. So we can
21 allege that they met. I can't give you a transcript yet of
22 what they said.

23 Two, they moderated, reviewed, directed and managed
24 private online chat rooms that were used to organize and plan
25 the violence.

1 They encouraged the use of weapons in their
2 communications about August 11 and 12th. They organized the
3 secret torch-lit march on August 11, which was unlike
4 August 12. There was no permit for that. It was secret, but
5 as we allege in the complaint and as we're seeing in
6 discovery, plans were underway to do that all the way going
7 back to the initiation of the Discord server in June. That
8 wasn't some kind of on the spur-of-the-moment plan. It was
9 something that had been planned as far back as June.

10 They coordinated which uniforms each group should
11 wear so that they would be identifiable. It's very crucial
12 for the James Fields allegations. They lined up and marched
13 in Emancipation Park and preplanned regimented order on
14 August 12. They charged at bystanders on August 12 in
15 militaristic fashion.

16 THE COURT: Well, did all of them do this, though?
17 We you say "they" --

18 MS. KAPLAN: Right.

19 THE COURT: They seem to be saying we don't -- we
20 won't accept the broad brush of all the defendants, when you
21 have this many defendants, to say all the defendants did so
22 and so without being specific about what they did.

23 MS. KAPLAN: So I would say -- I was talking about
24 the conspiracy as a whole. I would say -- I have three more
25 responses to that, Your Honor.

1 First, any conspiracies, particularly large
2 conspiracies, which this was, different people did different
3 things. We don't deny that. There were people who we
4 allege -- and most of the people actually who moved to dismiss
5 were the leaders of the conspiracy. They were the organizers,
6 the planners, the thinkers, for lack of a better term. We
7 don't allege that all of them -- we may find out in discovery.
8 We don't allege that they were the guys who were actually
9 marching in regimented order. They were directing the
10 marching in regimented order.

11 THE COURT: Were there any people -- I mean, do you
12 allege were there any people that, say, on Saturday that were
13 not part of this conspiracy but were there because they were
14 just protesting the idea or they did not wish the statute to
15 come down?

16 MS. KAPLAN: Yes, Your Honor.

17 THE COURT: People who were not members of the
18 conspiracy. There were people. You would agree there were
19 people there who were not members of your alleged conspiracy?

20 MS. KAPLAN: Absolutely.

21 THE COURT: Who shared or maybe shared the views of
22 the conspirators, as you allege, but were not actually members
23 of the conspiracy.

24 MS. KAPLAN: Correct, your Honor. I would not
25 contend that every person who showed up on their side in

1 Charlottesville on August 11 and 12 --

2 THE COURT: What if some of those persons
3 committed -- got caught up in the violence and committed
4 violent acts?

5 MS. KAPLAN: They're not liable as co-conspirators.
6 We are not seeking to hold anyone liable that way as
7 co-conspirators. We may identify additional co-conspirators
8 during the course of discovery. But what we're saying, we
9 carefully chose the 25 defendants we did. We obviously, as
10 you just noted, could have named many more. And I'm not
11 saying we couldn't have named more. I'm just saying we
12 couldn't have named everyone.

13 We chose them because with the exception of
14 Mr. Fields, who has not moved to dismiss, these were all
15 people who were directing, managing, kind of masterminding
16 what happened. And so we went to the hub, to use the analogy
17 from a drug conspiracy, to the hub of the conspiracy rather
18 than suing all the spokes. That's not to say that there
19 aren't spokes who could have be sued. It doesn't even mean
20 that there are not other spokes we may ask Your Honor to name
21 as we discover them in discovery.

22 But to understand our philosophy here, we went after
23 the leaders. And I hear Your Honor's concern about the size
24 of the conspiracy. Let me try to address that in a couple
25 ways.

1 First of all, I think living here today in this
2 country at this particular time, I think we can all agree that
3 the Internet and modern technology is both a blessing and a
4 curse, to quote the Bible, Your Honor. And it's certainly
5 true here.

6 There's no question that this particular conspiracy
7 could not have happened the way it did without the use of
8 Discord, podcasts and other modern technology that the
9 defendants explicitly used.

10 And to answer the question you asked earlier about
11 Discord, it is a private chat room. It's not something open
12 to the public. You have to ask to be admitted to one of these
13 chat rooms, and then -- I will show you later the
14 presentation -- be approved by one of the moderators. The two
15 moderators here were Mr. Kessler and Mr. Mosley.

16 The final response I want to have to your concern
17 about the scope is that looking back actually at the prior
18 cases in which 1985(3) similar conspiracies were upheld, they
19 also have been quite large.

20 We went back and we looked -- and I can hand up the
21 complaint if you want it, Your Honor -- at the Waller case
22 which was the Klan violence in Greensboro, North Carolina. In
23 that complaint that was upheld against a motion to dismiss,
24 there were 87 separate defendants who were named, so.

25 THE COURT: I don't think there is any problem how

1 many you name as long as you meet the Iqbal/Twombly standard
2 and have enough facts about each one to hold them in the case,
3 not just a generalization or conclusory language.

4 MS. KAPLAN: I agree, Your Honor. And we believe we
5 have. We gave you specific paragraphs in our oppositions to
6 the motions to dismiss. If you have specific questions, I
7 will address them.

8 To give you one example with respect to Mr. Spencer,
9 because it came up during argument, there was some discussion
10 about whether Mr. Spencer participated in Discord. We don't
11 know that. People use nicknames or handles, something like
12 that on Discord. So they don't use their own names. So we
13 only allege for the people who we knew we could identify by
14 the handler.

15 However, there is an individual on Discord that we
16 allege in Paragraph 78 of the complaint -- his handle was
17 Caerulus Rex who was a coordinator between various security
18 details and that he has been identified publicly as a frequent
19 bodyguard of Spencer.

20 Again, we think we are going to be able to hook many
21 more people in once we have the discovery. But we only have
22 people -- I'm very aware of my good-faith obligations. We
23 only allege the people on Discord who we could match their
24 handle to the specific people.

25 Another issue which I think Your Honor is obviously

1 familiar with which is obviously in a conspiracy case
2 circumstantial evidence alone is sufficient. That's because
3 in the typical case, as we have already discussed, your
4 plaintiff can only really guess at the contents of the secret
5 communications, at least until discovery is permitted.

6 And indeed in the Mendocino case that we cited in our
7 brief, the Ninth Circuit case, highly coordinated action and
8 repeated patterns of conduct has been held to be sufficient to
9 create a justifiable inference that preplanning occurred
10 sufficient to allege a conspiracy.

11 But here, Your Honor, we actually have a lot more
12 than that, as I think is clear from the size, detail, and
13 specificity of the complaint.

14 Here we have put forward dozens of the defendants'
15 communications before, during and after what happened in
16 Charlottesville in which defendants or groups of defendants
17 explicitly discuss their joint operation, discussed its white
18 supremacist objectives, discussed how to use racialized
19 violence and intimidation to achieve those goals.

20 Today, as I said, with the Internet and social media
21 platforms, the modern-day conspiracy can be formed and take
22 place largely online. And that is in substantial part what
23 happened here. Many of the communications, as we've said,
24 happened on Discord.

25 Discord is an online group messaging platform that

1 allows for simultaneous suite chats. As I said before and as
2 Your Honor cogently asked, it is a privately platform. It's
3 not open to the public.

4 If you turn to page 9, Your Honor, of the printed up
5 outline, it shows you what a page on Discord looks like. And
6 I think it is incredibly illustrative.

7 If you look in the right-hand column under "Event
8 Coordinator" at the top, Your Honor, you'll see -- and just to
9 be clear, the bottom quote that we highlight there is one
10 alleged in our complaint. I took this from the complaint, and
11 this is how the page actually appears on Discord.

12 You have event coordinator on the right. You have
13 Mr. Mosley and MadDimension. I'm sorry, Your Honor. I'm
14 losing my vision. We believe those two people are Mr. Mosley
15 and Mr. Kessler. You have a number of moderators. Again, we
16 don't necessarily know who those are. One is called Chef
17 Goyardee. One is called Heinz. One is called Kurt. And of
18 course with Discord we hope to identify those people.

19 You have a discussion at the bottom from Erika
20 talking about how this is not a public server in response to
21 some of those questions, that it is invite only through our
22 trusted, pre-vetted alt-right servers. We haven't even opened
23 it up to the proud boys or the alt-lite because the other
24 mods, event coordinators, and myself are all aware that they
25 act like kikes.

1 And then on top of that screen, Your Honor, you see
2 the kinds of communications that happened. This is all the
3 way back in June. I believe this is dated June 5. The kind
4 of communications that were happening all the time from the
5 early part of June until what happened on August 11 and 12,
6 communications all of which we don't have, but of the ones
7 that we have already clearly show a preconceived plan to
8 commit racialized violence in Charlottesville on August 11 and
9 12th.

10 As for the defendants who we know to be on Discord,
11 we know 11 of them were. Kessler, Mosley, Heimbach, Parrott
12 Cantwell, Ray, Vanguard America, Identity Evropa,
13 Traditionalist Workers Party, League of the South, and Daily
14 Stormer. And as I said, we have very strong reason to believe
15 that others, including Spencer, either were directly or
16 through people working for them, and we intend fully to
17 identify that during discovery.

18 In addition, certain of the groups actually had their
19 own servers. So if you look at the left, Your Honor, this is
20 the Charlottesville server, Charlottesville 2.0. If you look
21 at the left, these are all the different discussion groups
22 that they had. Shuttle Service, code of conduct, questions
23 for coordinators, flags, promotion, gear and attire. You can
24 see that on the left.

25 Then in addition to this, certain groups like

1 Identity of Evropa had their own Charlottesville server. So
2 when it said Charlottesville 2.0, it was its own Vanguard
3 America server for Charlottesville.

4 And as I said, we believe that what we have here is
5 just the tip of the iceberg. We are pursuing discovery, as
6 Your Honor can imagine, against Discord. These all came from
7 stuff that was openly available on the Internet. And we
8 believe there is much, much more.

9 Indeed, there was a leadership chat on Discord, one
10 of these topics, and we don't have the communications in that
11 chat. That has not been made publicly available. We intend
12 to pursue it in discovery.

13 In addition, Your Honor, some chats have been made
14 public since we amended our complaint. To the extent Your
15 Honor is at all interested, we actually could amend to add
16 them, but we are constantly getting new information in all the
17 time through discovery and otherwise.

18 If that's -- I'm going to go now to the second
19 element, Your Honor, if it's okay with you, which is the fact
20 that defendants were motivated by a specific class-based
21 invidiously discriminatory animus. Here I don't think there
22 is much really to argue about. Defendants don't really argue
23 that that didn't exist here.

24 As I said before, the Supreme Court precedent is very
25 clear that it's not only discrimination against black people

1 or Jewish people but also people who advocate for their
2 rights. And that shows up in the Carpenter case and the
3 Waller case that we cite in our briefs.

4 The Fourth Circuit itself has explicitly held that
5 animus against Jewish people is sufficient to satisfy the
6 discriminatory animus element of Section 1985. We cite the
7 *Ward v. Connor* case for that.

8 And it should even be noted as occurred in the
9 Griffin case that the plaintiff doesn't even have to be right
10 about it. Remember, in Griffin the defendants mistakenly
11 thought a white guy in the car was a civil rights worker. It
12 turned out he wasn't, but that still was sufficient to state a
13 1985(3) claim.

14 As for the third element, which is what Your Honor
15 asked about, which is the basis of the objective that would
16 be -- that is for which defendants could be liable under
17 1985(3), as we've explained we believe that this is a core
18 racially motivated violence case which is a badge and incident
19 of slavery under the Thirteenth Amendment.

20 I told you about those cases in which courts in the
21 conduct of hate crimes have held that racially motivated
22 violence is itself a badge and incident of slavery.

23 I can refer you to the *United States v. Roof* case out
24 of 2016, and there are other cites that all stand for that
25 proposition.

1 Although some of the defendants have seemed to argue
2 that badges and incidents of slavery somehow was only actual
3 in enslavement or actually having, you know, bonds around your
4 wrists or things like that, we obviously know that's not true.
5 That's not what the cases say. It's certainly not what the
6 Supreme Court said in Griffin.

7 And indeed, in Griffin, as I suggested, the Supreme
8 Court talked about claims of detention, threats and battery as
9 also coming within the ambit.

10 So let me just again kind of repeat what I said. If
11 you kind of think about what happened here, Your Honor, both
12 the torch-lit rally on March -- I mean, August 11 -- excuse
13 me -- the kind of temporary detention of worshipers at
14 St. Paul's Church on August 11 because of the horrible
15 violence going on outside and, of course, what happened at the
16 synagogue we think are all classic racially motivated
17 violence, badges and incidents of slavery acts. I can go
18 into --

19 THE COURT: Was there any property damage or injury
20 to anyone at the synagogue?

21 MS. KAPLAN: I don't -- Your Honor, we didn't
22 allege -- we said that they had to do some stuff to, like, add
23 security measures, etc. I don't there's -- there's not
24 secure -- there's not property damage for which we are making
25 a claim.

1 Our claim is under 1982, that the kind of marching
2 and intimidation that happened outside the synagogue Saturday
3 was a classic 1982 violation. The courts have held that you
4 don't have to be an owner of the property. You can be a
5 member of a synagogue.

6 In fact, Your Honor, sadly there seems to be a whole
7 line of Section 1982 synagogue cases. It seems to be the most
8 common feature in 1982 of cases which we cited in our brief
9 where people do drive-by shootings or shouting or intimidation
10 of a synagogue. It keeps Jewish people understandably fearful
11 given the blood and soil references, the torch-lit rally here.
12 I think any Jewish person would reasonably be fearful.

13 THE COURT: If you walk past the synagogue and make
14 an anti-Semitic shout or something, that doesn't violate --
15 that is a First Amendment right.

16 MS. KAPLAN: No. And if an individual person in a
17 peaceful circumstance walks by the synagogue and calls
18 everyone in there kikes, that doesn't state a 1982 violation,
19 but that's not what we allege.

20 What we allege is that essentially armed groups of
21 men, mostly men wearing Nazi insignia, carrying weapons
22 marched around the synagogue, not only shouting Nazi slogans
23 but talking about burning it and bombing it and burning it
24 down. And that kind of --

25 THE COURT: All of that happened right there?

1 MS. KAPLAN: Yes. Part of it was because it was so
2 close to Emancipation Park. So all the people who were at
3 Emancipation Park, it was a hop, skip and jump for them to go
4 over to the synagogue. It's less than, as you know, a couple
5 blocks away to do that.

6 And we allege how the members of the synagogue,
7 including our plaintiff, were so incredibly fearful for
8 themselves, for their sacred objects in the synagogue, the
9 fact that they had to leave out the back door and since then
10 have had to implement all kinds of security measures to
11 continue to use the synagogue the way any American should be
12 able to use their house of worship. So I think that covers
13 the 1983 -- the 1982, your Honor, as well.

14 The next element is injury. Again, there doesn't
15 seem to be much of a dispute here that our plaintiffs were
16 injured. To give you probably the most dramatic examples,
17 Plaintiff Magill had a stroke that the doctors attributed to
18 the events and stress of what happened.

19 Plaintiff Marcus Martin was hit by the car.
20 Plaintiff Wispelwey was, as you heard talked about earlier,
21 was intimidated, threatened, and maced during the events that
22 occurred.

23 Overt acts again, I think again we've talked about
24 that. If there's a conspiracy, we obviously know there have
25 to be overt acts, and we have alleged numerous overt acts

1 throughout the complaint.

2 Let me -- if Your Honor has -- I'm happy to answer
3 any other 1985(3) questions, but I was going to go to the next
4 argument, if that's okay with Your Honor.

5 THE COURT: Okay. I just wanted to understand. If
6 you're a member of one of these associations, how far does the
7 liability go? How does the association become liable for the
8 members of its organization and have the members liable for
9 anything the organization may be --

10 MS. KAPLAN: So you're talking about something like
11 the Traditionalist Worker Party or Vanguard America, etc.,
12 etc. So those associations in and of themselves, themselves
13 responded, encouraged, promoted, asked people to come to the
14 event. As I said before, some of them even had their own
15 Discord channels to do that kind of planning and
16 communication.

17 And then as I said before, for the most part, with
18 the exception of Defendant Fields who has not moved, we have
19 sued the people who were the leaders of the organization. So
20 we're not suing, you know, kind of the people at the bottom.
21 We are not suing the spokes, again, for the most part. We are
22 suing the leaders.

23 And it was very clear as you'll see in the
24 communications that it wasn't just individuals. It wasn't
25 just Matt Heimbach as an individual in the Traditionalist

1 Worker Party supporting, planning, and conspiring for the
2 events on August 11 and 12th. It was the Traditionalist
3 Worker Party itself.

4 And they talk about -- you heard, I think, a quote
5 before about we acquitted ourselves as warriors. That was
6 discussion of a group of an association. I don't recall which
7 one, but they all use that similar kind of language.

8 Let me talk about defendants' argument about
9 liability by association, Your Honor, because I understand
10 your questions about that. And as I've said, we've tried to
11 be very careful about who we chose and why we chose them. And
12 we believe that each of the defendants we have chosen played a
13 very prominent role and was an influential member or leader of
14 the conspiracy.

15 If you turn to slide 12, Your Honor, that shows based
16 on allegations in the complaints connections that the
17 defendants had to each other prior to August 11 and 12th. So
18 these were not a bunch of random people who all happened to
19 show up in Charlottesville on August 11 and 12th and then kind
20 of get involved in a riot. These were all people who knew
21 each other, had multiple interconnections with each other well
22 before August 11 and 12.

23 And to give you an example, Defendant Damigo is the
24 founder of Identity Evropa. Mosely, another defendant, became
25 the leader of Identity Evropa in 2016.

1 The Traditionalist Worker Party was created by
2 Defendants Heimbach and Parrott. Heimbach, along with Schoep
3 and Hill lead the Nationalist Front. Schoep is also the
4 leader of the National Socialist Movement. And Hill is also
5 the cofounder and president of League of the South. So these
6 entities all have multiple interconnections not only by
7 association but with membership affiliates that preexisted
8 anything that happened August 11 and 12th.

9 I know there was an argument about the Nationalist
10 Front and whether it's just a website or it's truly an
11 organization. On that, Your Honor, I believe an affidavit was
12 put in. We believe we have a right in discovery to contest
13 that affidavit and there'll be an improper action for Your
14 Honor to take on a motion to dismiss.

15 In addition, Your Honor, following these slides we
16 have slides for each of the defendants who move to dismiss
17 with particularized allegations in the complaints about each
18 them.

19 And I'm not going to go through all of them, Your
20 Honor. Your Honor can read them for yourself obviously. But
21 just to start with Richard Spencer on the slide 13, there's
22 numerous allegations in the complaint about Mr. Spencer's
23 role, what he did and what he said. Same thing, Your Honor,
24 for Mr. Kessler. Same thing for Mr. Mosley.

25 And let me go forward, Your Honor, because I want to

1 give some time for my colleague, Ms. Dunn, to speak to
2 Vanguard America and James Fields, which is on Paragraph 22.

3 So there is a factual dispute here. Again, I don't
4 think it's amenable for resolution on the motion to dismiss.
5 We argue that James Alex Fields showed up wearing the uniform
6 of Vanguard America on August 12. We allege that he was
7 holding a shield with the insignia of Vanguard America on
8 August 12.

9 We believe, as Your Honor I'm sure has surmised, that
10 all of the discussions leading up to August 11 and 12th, the
11 discussions them called edgy jokes about running over
12 protesters were not truly edgy jokes, Your Honor. They were
13 truly discussions and planning and encouragement of what they
14 wanted people like Mr. Fields to do. And we believe that's
15 exactly what he did.

16 We understand that they're saying he's not a member,
17 but that is something that we will be able to explore in
18 discovery. It is not an issue that we believe Your Honor
19 should resolve on a motion to dismiss.

20 One more thing, Your Honor, and then I'm going to let
21 my colleague take over. And I think we have resolved the
22 other questions. The state law, I think we can rest on our
23 brief unless you have any questions.

24 THE COURT: No.

25 MS. KAPLAN: But of course, Your Honor, a party is

1 liable for the reasonably foreseeable consequence of the
2 conspiracy. And that doesn't mean that the conspiracy has to
3 go exactly as planned. The drug conspiracies that you're
4 talking about, often all kinds of horrible things happen
5 during the course of a drug conspiracy. Sometimes people are
6 killed, perhaps not --

7 THE COURT: Everyone in a conspiracy is liable for
8 the reasonable -- what might reasonably be expected to happen
9 whether it's what was planned or not.

10 MS. KAPLAN: Right. So our allegations here are not
11 only that much of this stuff was planned, discussed, and
12 encouraged, but as Your Honor just said, they are also liable
13 for all the reasonably foreseeable consequences. And having
14 weeks and weeks and weeks of discussions telling people, you
15 know, if you beat up a nigger, it's not really beating
16 someone, telling people which weapons to bring, telling people
17 how to take a sock and put pennies in it to hit someone over
18 the head, talking about running over protesters, and even
19 worse, Your Honor, talking about the legality of running over
20 protesters. That was all planned for what they actually did.
21 And even if it wasn't planned, Your Honor, it was perfectly
22 reasonably foreseeable given the planning of this conspiracy.

23 Your Honor, I'm going to turn the table to my
24 esteemed colleague. And I'm obviously happy to answer any of
25 your questions.

1 THE COURT: All right. Thank you.

2 MS. DUNN: Good afternoon, Your Honor. Karen Dunn
3 from Boies Schiller Flexner for the plaintiffs.

4 Hopefully -- we took seriously Your Honor's
5 invitation to assist the court. So hopefully you have the
6 second slide deck which should be titled "Constitutional
7 Defenses." And I'll use that to assist in the argument.

8 THE COURT: All right.

9 MS. DUNN: When we're talking about constitutional
10 defenses, we're talking about the First Amendment and the
11 Second Amendment in this case. Only 20 out of 25 defendants
12 raised a First Amendment defense, although I've heard
13 Mr. Kolenich raise it here on behalf of his 13 defendants, but
14 as to them we would argue these arguments are waived in any
15 event.

16 Out of the five who did, the briefing is very
17 general, talking about the importance of the First Amendment,
18 something that absolutely no one here would deny. And out of
19 those five, only four of them raised the Second Amendment
20 defense.

21 So at the outset, Your Honor, because there's been a
22 lot of discussion already about speech in this case, I want to
23 make something very clear, which is that the plaintiffs in
24 this case believe in the importance of the First Amendment and
25 its protections.

1 And, in fact, it's because they believe in all of our
2 freedoms and protections in part why they decided to bring
3 this case rather than privately nurse the injuries that they
4 suffered.

5 If you look, Your Honor, on page 2 in the deck, it
6 cites Justice Black and his decision in *Giboney v. Empire*
7 *Storage & Ice Company*, a decision from 1949. And as Your
8 Honor probably well knows, Justice Black was a big champion of
9 the First Amendment. And he set us on the right track for
10 decades after, followed in the Supreme Court and other courts,
11 by telling us that the First Amendment does not protect
12 violations of valid statutes even if speech is part of the
13 course of conduct, because if it did, it would be practically
14 impossible to enforce the law. So slide three is a road map
15 of our explanation of why the First Amendment would not be a
16 valid defense in this case.

17 The plaintiffs in this case allege that defendants
18 participated, as Ms. Kaplan explained, in a common plan, a
19 conspiracy to do violence and to intimidate and that the
20 plaintiffs were injured as a result.

21 The First Amendment, as is axiomatic under the law,
22 does not protect against violence. It does not protect
23 against intimidation or legal conspiracies.

24 And so plaintiffs have alleged in the complaint words
25 of the defendants. Of course, the defendants' words appear

1 and they appear for three reasons, none of which encroach on
2 the First Amendment.

3 First, they appear to show that defendants were part
4 of the conspiracy.

5 Second, the words are there to show that defendants
6 had intent to do violence or to intimidate.

7 And, third, the defendants' words appear to show
8 invidiously discriminatory animus, which is required under
9 1985(3). And we'll talk a little bit about each of those
10 things.

11 Slide four talks about and lays out the case law here
12 about violence and intimidation not being protected by the
13 First Amendment. And the key cases there, I'm sure Your Honor
14 is well familiar with, *Wisconsin v. Mitchell*, *American Life*
15 *League v. Reno* in the Fourth Circuit -- that was Judge
16 Michael's opinion -- and of course for true threats, *Virginia*
17 *v. Black*.

18 So if I beat someone up because my view is I don't
19 like their race, the First Amendment doesn't protect me. And
20 that's true if I scream at them very loudly that I don't like
21 their race and then beat them up. It's true if I get together
22 with my friends and decide that together we're going to do
23 that and scream at them together. And it's the same thing,
24 Your Honor, if that happens on the Internet.

25 Intimidation, *Virginia v. Black*, as Your Honor has

1 previously applied in your decisions protects against a true
2 threat. And importantly, as you've noted, the speaker does
3 not have to intend to carry out the threat. They just have to
4 intend to place a person in fear of bodily harm or death.

5 And so slides five and six are meant to assist the
6 court by outlining the paragraphs of the complaint that allege
7 violent conduct on August 11 and 12th and allege intimidation
8 on August 11 and 12th. And I think Ms. Kaplan amply described
9 some of the acts of violence, the assaults, the kicking, the
10 beating, the tear gas, the mace. And so I think it's best if
11 I focus on a few of the allegations of intimidation because
12 those are arguable -- argued by the defendants.

13 THE COURT: I don't think anyone seriously would
14 argue that the First Amendment protects violence or physical
15 harm to somebody to express your opinion. Protects the words
16 but not violence.

17 MS. DUNN: I think what they're -- the defendants'
18 arguments appear closer to saying, well, we're just saying
19 these horribly offensive words and that's protected speech.

20 And so just to point Your Honor to one example on
21 page 7 which is --

22 THE COURT: The speech could be evidence -- if you
23 did all the beating someone up, your words might be evidence
24 of what your intention and the motivation is.

25 MS. DUNN: Exactly. So the words are, in our

1 complaint, evidence of intent, which is well accepted under
2 the law. They are evidence of the formation of agreements and
3 participation in the conspiracy. And they're evidence of
4 invidiously discriminatory animus, which is required under
5 1985.

6 And so, Your Honor, I just want to point out because
7 I heard defendants argue about how conclusory our complaint
8 is, and they seem to be upset that there is not enough detail.
9 And on the other hand in their briefs they argue that we are
10 quoting their words too much and we are talking too much about
11 the things that they said, but this specifically goes to the
12 allegations of the complaint.

13 For example, when Defendant Ray says, "The heat here
14 is nothing compared to what you're going to get in the ovens,"
15 maybe in some context that would be looked at as some sort of
16 protected speech. In this context it was said during a
17 torchlight rally where people were throwing lit torches and
18 also throwing unidentified fluid on people.

19 So taken together, our complaint clearly does not do
20 what the defendants in their briefs and to some extent here
21 say, which is be unhappy about somehow offensive speech or
22 things that were said that people might not like. I think the
23 detail of the complaint specifically goes beyond that.

24 Another example, Plaintiff Romero in the days
25 following August 12 when Defendant Fields drove a Dodge

1 Challenger into a crowd killing somebody received phone calls
2 to her house offering to sell her a Dodge Challenger. So to
3 some extent, in some context that could be speech. And here
4 it is a threat and it's intimidating. And as Your Honor well
5 understands, it goes to the evidence that we will present
6 about the conspiracy to do violence and to intimidate.

7 So, Your Honor, most of our slide deck is really just
8 to help you break down what parts of our complaint are used as
9 evidence of a conspiracy and used as evidence of intent.

10 And it is a fairly unusual thing to have so much of
11 defendants' language at this point at the motion to dismiss
12 stage. Normally you wouldn't even get this until later on.
13 And so we have alleged a lot of detail in this complaint. And
14 that is a virtue of the fact that we have it, but we expect,
15 as Ms. Kaplan said, to receive more if Your Honor allows
16 discovery to proceed.

17 Your Honor, one thing that I do want to call Your
18 Honor's attention to -- I won't go through all of these -- but
19 is on slide 11. There was a lot of discussion about
20 allegations with regard to Mr. Spencer. And just generally
21 speaking, there is a conspiracy in this case where acts were
22 talked about on the Internet. Acts exactly the same or
23 similar to those acts happened. And then after members of the
24 conspiracy took credit for those acts.

25 And so on page 11, there is a particular allegation

1 to Mr. Spencer where following the Friday night torch march
2 where people are assaulted and there is violence and
3 intimidation, Spencer says to the crowd, "We own these
4 streets. We occupy this ground."

5 And so that -- in any conspiracy case, frankly if
6 there were no other allegations specific to him other than
7 that he was a leader of the conspiracy, that he knew these
8 people, the fact that he was a participant and a leader at an
9 event and then overtly claimed credit for it would be
10 sufficient to keep him in the case at the motion to dismiss
11 stage.

12 Having some familiarity with these drug cases, if you
13 are the organizer of the drug conspiracy, you're not the
14 person who swallows the drugs and takes it on the airplane.
15 But if you are the person who helps set up the means to do
16 that or helps organize the plan to do that, and then
17 afterwards all that is alleged is you say to the person, you
18 know, great job doing that and that is evidence of your
19 agreement, of your conspiracy with others to do that and then
20 your speech of saying to the person who actually performs the
21 act, well done, good job for our team, you have basically
22 adopted what they have done as part of the conspiracy. And
23 that is not dissimilar to what happened here.

24 I think the leaders in this conspiracy didn't always
25 have their specific fingertips on the acts of the conspiracy,

1 and but they did help organize, and in many circumstances we
2 are seeing evidence that they took credit for it after the
3 fact. I think it bears some discussion to talk about --

4 THE COURT: Well, to take credit for that, for the
5 violence, in effect you are saying that they admitted that
6 they participated in the violence.

7 MS. DUNN: Well, it's alleged that they did
8 participate. They were there. They organized. But I think
9 it's additional evidence of their participation and their
10 leadership if you're the person who subsequent to that
11 addresses the crowd and claims victory after the assaults and
12 after the violence and intimidation have taken place.

13 THE COURT: Well, of course, if you prove that they
14 planned it and at the end they took credit for it or said, you
15 know, we did a good job, that's right. But just taking and
16 saying I'm happy this happened at the end of something doesn't
17 make you part of the conspiracy.

18 MS. DUNN: Well, that's true, Your Honor, but that's
19 not all that we allege.

20 THE COURT: Okay.

21 MS. DUNN: I agree with you. You just can't be a
22 separate person and say it's great that that happened, but we
23 include Mr. Spencer's comments in the complaint to show as
24 evidence of his participation in the conspiracy. And so when
25 counsel to Mr. Spencer gets up and says there's no statements

1 from Mr. Spencer in the complaint, that's just not true.

2 In fact, there is a statement from Mr. Spencer after
3 he participates in the Friday night torch march and witnesses
4 all of the assaults to climb up and say to the crowd and
5 address the crowd to say, "We own these streets." And so that
6 at a motion to dismiss stage is certainly sufficient even
7 alone without the rest of what's alleged in the complaint to
8 keep him in the case.

9 THE COURT: "We own the streets"? I mean what --

10 MS. DUNN: "We own these streets. We occupy this
11 ground."

12 THE COURT: All right. Why -- how does that make him
13 conspiring to commit violence?

14 MS. DUNN: Well, it makes him part of the conspiracy
15 to do violence. Actually, I shouldn't say that. It is
16 evidence of his participation in the conspiracy to do
17 violence. And this taken together with the other allegations
18 in the complaint that just go to his relationships with the
19 other members of the conspiracy taken together are allegations
20 sufficient to keep him in this case.

21 But my point is that Mr. Spencer was not just some
22 sort of passive participant in this as his counsel would like
23 Your Honor to believe. He was an organizer. He was a leader.
24 He was the person who when in the immediate aftermath of this
25 happening addressed the crowd to say that the objective had

1 been achieved. And so that's the point.

2 I agree with Your Honor it is not the only thing, but
3 all of these statements put together in the complaint are
4 evidence of the defendants' intent and of their participation.
5 So to look at these things in very discrete isolation is --
6 would be, I think, improper.

7 The reason conspiracies are pled in this way is as
8 Your Honor says. At this point you wouldn't be able to
9 connect every dot. Actually, here we are able to connect more
10 dots than is usually the case at the complaint stage, but it's
11 just not required. It's not just required.

12 So let me quickly address the requirement of alleging
13 invidiously discriminatory animus under 1985(3). So most of
14 the briefing on the First Amendment is a complaint about
15 plaintiffs' reliance on defendants' speech and saying that
16 we're just upset about offensive words.

17 And I think it is an important point to understand
18 legally that 1985(3) requires these statements to be in the
19 complaint. It requires us to rely on statements or other
20 indicia that defendants had invidiously discriminatory animus.

21 And in *Bray*, which is a case that defendants rely on,
22 Justice Scalia of the Court, he recognizes that this is a
23 requirement. And he says that not only do you need to say and
24 prove that there is invidiously discriminatory animus, you
25 have to show that these acts were done for this reason.

1 So the defendants cannot be heard to complain that we
2 have included allegations in this complaint that specifically
3 go to this requirement. And so on page 13 we've listed some
4 of those, but that is why they're there. They are not --
5 there is not a single allegation in this entire complaint that
6 alleges that plaintiffs are disturbed simply by offensive
7 speech.

8 I heard Mr. Kolenich raise the Skokie case. The
9 Skokie case is not applicable here. It is a case where the
10 Supreme Court only passed on an issue of prior restraint and
11 decided a prior restraint was not appropriate in a
12 circumstance where there was going to be a march. The march
13 turned out to be a peaceful march. And then the Illinois
14 Supreme Court issued what turned out to be a more or less
15 merits opinion.

16 *Virginia v. Black* relies on that case basically to
17 say you have to look at acts in context and that burning a
18 cross is not always something that is without First Amendment
19 protection, but in certain circumstances if it is accompanied
20 by other indications that it is motivated by animus, that it
21 is prohibited under a valid law, then it is punishable.

22 So in order to rely on this Illinois Supreme Court
23 case, you would have to ignore all of the law in this area
24 which talks about what conduct is actually prescribable under
25 the First Amendment and in particular all the case law under

1 1985(3).

2 And so here I will just say that most generally
3 construed, defendants' arguments about speech are essentially
4 an argument that 1985(3) is not constitutional because you
5 have to prove the purpose of the act, which is this
6 invidiously discriminatory animus, but there is a series of
7 cases, and I will just name them in case this is helpful to
8 Your Honor: *Wisconsin v. Mitchell*; *Thomasson v. Perry*, which
9 is a Judge Wilkinson opinion; *American Life League*, which is a
10 Judge Michael opinion, that all discuss that if a law is
11 content neutral, which 1985(3) is, then that is perfectly
12 permissible and there is no First Amendment forcing that they
13 draw analogy to the Title 7 context.

14 A number of the arguments that defendants make are
15 not -- are really not proper at the motion to dismiss stage.
16 Mr. Peinovich pointed to Paragraph 141 of the complaint. And
17 he says, well, when I made the point I was making in
18 Paragraph 141, I was really just issuing a warning that
19 violence could happen. And so this is not a reason for a
20 complaint to be dismissed or to find that Mr. Peinovich is
21 protected under the First Amendment against enforcement or
22 proceeding of the case under 1985(3).

23 What he has effectively done is he has teed up what
24 is a fact dispute. And hopefully he has also now conceded, to
25 some extent, knowledge of what happened. And so if Your Honor

1 allows this case to proceed, what is going to happen is there
2 will be an argument between the parties about whether
3 Mr. Peinovich was evidencing his intent, was evidencing
4 knowledge that violence was going to happen because he was
5 helping to plan violence, or was he just simply issuing a
6 warning to people that violence can happen and he was looking
7 out for their welfare.

8 And so the other citations in the briefs -- and this
9 is mainly Mr. Peinovich's brief, Mr. Spencer's brief and
10 Mr. Hill, Mr. Tubbs and League of the South brief. They
11 characterize the things that they were saying as just edgy
12 jokes. They say we have no sense of humor, which I assure
13 them is not the case, and they say that their statements were
14 just bravado. So these are fact disputes. They are allowed
15 to say that. And I assume if this case goes forward, we'll
16 have that conversation some more.

17 They rely heavily on Brandenburg. I assume Your
18 Honor knows at this point we are not alleging incitement.
19 That is not our basis for liability. There are a few
20 allegations in the complaint that are alleged incitement.

21 Like, for example, when one of the defendants yells
22 "charge" and then people charge into a group. So there are
23 incidents of incitement, but we do not rely on meeting the
24 Brandenburg standard for satisfying our burdens on the motion
25 to dismiss.

1 Unless Your Honor has questions about the Second
2 Amendment, I will skip discussion of that.

3 THE COURT: I don't think that's necessary.

4 MS. DUNN: And I think just on behalf of all us, Your
5 Honor, we really appreciate the generosity of your time.

6 THE COURT: It's your time. It's not my time.

7 All right. Would you like to respond?

8 MR. KOLENICH: Thank you, Your Honor. It's
9 remarkable after the way they drafted their complaint that
10 they are standing up here saying we really just needed to
11 prove racial animus for 100-and-whatever pages and however
12 many hundreds of paragraphs. Your Honor doesn't need to spend
13 one single second worrying about that. For purposes of the
14 motion to dismiss, my clients had racial animus. Admitted.
15 No problem.

16 The Skokie case is directly relevant. Nobody is
17 saying you can immunize yourself from being sued over violence
18 because it also has a political component to it.

19 What we're saying is if all you do is use speech,
20 unless it's prescribed by Section 1982 with those particular
21 requirements, it's protected under the First Amendment. It is
22 not actionable. It is not actionable that they had swastikas.
23 It is not actionable that they had anti-Semitic T-shirts. It
24 is not actionable that they said anti-Semitic things. It is
25 not actionable that they said racial things. It is only

1 actionable if it morphs into conduct. And they have a problem
2 with their conspiracy allegation. They need to prove before
3 the conduct occurred.

4 There's a lot of talk about what they said
5 afterwards, great, awesome, we got our guys out, and worse. A
6 woman died in a car accident and people are on the Internet
7 laughing about it. And I promise you, Your Honor, right now
8 while I'm standing here, somebody on the alt-right is
9 publishing something on the Internet that is not helpful to
10 their case. It's not civilized, not a good idea. And no
11 matter how many times the lawyers tell them that, it doesn't
12 help. Many of them, that's how they are, but post hoc
13 statements don't help them prove a conspiracy. They cannot by
14 their nature help them prove a conspiracy without the
15 preparatory planning.

16 And again, as I said before, there's a lot of
17 planning. Again, admitted. The court doesn't need to worry
18 about that, but what is it planning for? In the universe of
19 their complaint, what are they planning? They're planning to
20 go to Charlottesville. They're planning to go Charlottesville
21 and march around and insult racial minorities and religious
22 minorities for a political purpose. At the end of the day,
23 the political purpose is about a local statue.

24 Forgive me. I'm from Ohio. I don't even know what
25 statue it is or what general it is, and it's about opposition

1 to multiculturalism in general, which are perfectly
2 permissible First Amendment protected speech.

3 To the extent that any violence happened, if they
4 have alleged any violence in their complaint -- limiting
5 ourselves to their complaint as we must -- all they've got is
6 in the spur of the moment somebody threw some torches. That's
7 it, or Robert Ray shouted at the people in front of a
8 synagogue, or somebody maced somebody back by the statue.
9 There is no evidence of planning for that.

10 There's evidence of planning to bring torches.
11 There's evidence of planning to bring mace and use sticks and
12 whatever else as weapons if necessary. And that's in the
13 Discord. And that's in their complaint, the little snippets
14 that they put in the complaint, but there is no evidence of an
15 overarching conspiracy that anybody could have joined to
16 affirmatively commit these acts of violence.

17 And again, they want the Court to use the presence of
18 a swastika and the presence of the phrase "blood and soil" and
19 other such Nazi imagery because of the effect it has on Jewish
20 people and people in a synagogue. The First Amendment doesn't
21 allow for that. The Skokie case stands for that.

22 And I'm not sure counsel got that case exactly right.
23 If I'm not mistaken, that march didn't actually happen. They
24 decided not to hold it after they got the permission to hold
25 it, or at least one of the scheduled marches didn't happen.

1 So the violence that was committed, James Fields, the
2 car attack, where is there anything in the Discord planning
3 that? Negligence is not enough. Recklessness also is not
4 enough. It has to be intentional misconduct. They have to
5 intentionally have planned to run people over in
6 Charlottesville for this conspiracy to stick, for this to
7 survive a motion to dismiss.

8 THE COURT: Aren't there sufficient allegations that
9 Fields intentionally ran people over?

10 MR. KOLENICH: There is certainly sufficient
11 allegations that Fields intentionally ran people over. What
12 we're saying is that there were no sufficient allegations that
13 that was part of the a priori conspiracy even in the moment.

14 When did he decide to intentionally run people over?
15 When -- you know, they basically stood up here and said
16 Vanguard America, which is one of my clients, told Fields to
17 run people over. That's not in their complaint. They want
18 you to deduce that again from the First Amendment protected
19 speech. That's our whole point.

20 The Court may disagree with us when you review the
21 pleadings, but that is the only point we're trying to make
22 with the motion to dismiss. We are not saying -- I think
23 there's some confusion on this -- that 1985 isn't applicable.
24 We are not saying that the Thirteenth Amendment and
25 Section 1982 don't support a 1985(3) conspiracy claim. There

1 are hundreds of reported cases on the subject. It absolutely
2 does. Racial animus is an element of that, but again we are
3 conceding that for purposes of this motion. So that's not our
4 argument. If other people are going to make that argument,
5 great.

6 We're not saying that each and every member of the
7 conspiracy had to agree to each and every part of the violent
8 acts. That's not my clients' argument. If other people want
9 to make that, okay, but you don't have to worry about that for
10 our motion.

11 What we're saying is there are no sufficient
12 allegations that our people agreed to do anything except go to
13 this rally carrying torches, carrying mace, on and on and on.

14 They did not plan to or agree to attack anybody.
15 Now, and that's not -- that's not an obtuse legal concept.
16 You know, if a Sears repairman goes to somebody's house to
17 repair their dishwasher and then he goes over and commits a
18 rape of someone living in the house, Sears gets off the hook.
19 That's not what they sent him there to do.

20 Now, if Sears sends them in the house and they said,
21 hey, grab the lady's wallet while you're there, they're still
22 not liable for the rape even though they sent him in there to
23 commit a crime because he went beyond what they told him to
24 do.

25 So all of these criminal acts either happen -- or

1 these violent acts, I should say, either happen on a
2 spur-of-the-moment conspiracy between a limited number of
3 people who don't involve all of my clients, or in most cases
4 any of them, or they exceeded what my clients did agree to go
5 there to do and, therefore, my clients can't be held liable.

6 My clients at worst were reckless with the language
7 in what they sent people in there to do. This was no
8 actionable intent -- they haven't pled any -- to commit the
9 violent acts they're complained of, most especially not the
10 James Fields car attack.

11 Thank you, Your Honor.

12 THE COURT: Thank you. Sir?

13 MR. JONES: Your Honor, the difficulty for plaintiffs
14 is that there are 25 separate defendants. And it's not enough
15 to simply say all the defendants conspired to engage in
16 violent acts. They have to show particular facts for each
17 particular defendant, as Your Honor pointed out. Hopefully in
18 their memorandum --

19 THE COURT: Well, you don't have to show that each
20 committed a violent act but they conspired, each was a member
21 of a conspiracy to commit a violent act.

22 MR. MALE SPEAKER: That's right. And what we have
23 here, Your Honor, as was the case in Twombly, I think, is
24 parallel conduct. We have my clients, Mr. Hill, Mr. Tubbs,
25 League of the South attending the same planned rally as the

1 other defendants. There were hundreds if not thousands of
2 people at that rally. The plaintiffs are trying to hold my
3 clients responsible for everything, all the violence that
4 happened on those two days. I don't think they have
5 sufficiently pled facts to show there was a conspiracy to
6 satisfy the Twombly standard.

7 Thank you, Your Honor.

8 THE COURT: Thank you, sir.

9 MR. DiNUCCI: Thank you, Your Honor. I'm not sure
10 how much time I have. I'm sure you will tell me when to stop.
11 Thank you, Your Honor.

12 Judge, one of the points that opposing counsel made
13 is that the arguments of defendants are tantamount that
14 1985(3) is unconstitutional. I'm not arguing that.

15 My position, Judge, given the facts pleaded in this
16 complaint and the cases I cited earlier, 1985(3) doesn't
17 apply. They don't have any claim for violation of equal
18 protection or freedom association, freedom of speech because
19 there's no state action here.

20 To the extent they try to bootstrap themselves into
21 1985(3) through the Thirteenth Amendment with one exception,
22 that of Ms. Pearce, they don't cite any implementing statute
23 under Section 2 of the Thirteenth Amendment. So the
24 Thirteenth Amendment doesn't apply.

25 With respect to Ms. Pearce's claim, as I recall the

1 allegations, her situation, if you will, is different from
2 that of the plaintiffs in -- I think it was Brown and Greer.
3 There was no act of violence at or within the synagogue.
4 There was no physical damage to the synagogue. There was no
5 personal injury to Ms. Pearce. Nobody laid a hand on her if I
6 recall correctly the allegations of the complaint. So the
7 simple fact is 1982 doesn't apply here. They haven't pleaded
8 facts to make it applicable.

9 Now, there is talk about -- I believe this is the
10 *Waller v. Butkovich* case that's been cited by the plaintiffs
11 and talking about how supporters of black people and their
12 equal rights, their civil rights have standing to sue.
13 Assuming the argument under that is true -- and I don't agree
14 with that. I haven't seen a Supreme Court case that says
15 that.

16 In fact, to the extent there's a reference in
17 Breckenridge to supporters, it's in discussing the legislative
18 history of the civil rights acts or the Ku Klux Klan Act -- I
19 always forget which title it is -- from the post Civil War
20 era.

21 I haven't been able to find a U.S. Supreme Court case
22 that says supporters have the standing that the plaintiffs
23 claim they do. But assuming that they do, the plaintiffs'
24 case, *Waller v. Butkovich*, which is 584 F. Supp. 909 -- it's
25 from the Middle District of North Carolina -- says at

1 page 937, "The Court notes, however, that to succeed on this
2 ground," meaning supporters have rights, "the plaintiffs must
3 prove that they were identifiable in defendant's eyes as
4 member of a class of advocates of equal rights for black
5 people; otherwise, the defendants could not have singled them
6 out as objects of conspiracy on this ground."

7 There's no pleading of facts along those lines.
8 There's no pleading, for example, that any defendant knew any
9 of these plaintiffs, saw any of these plaintiffs, could figure
10 out who they were and what they were there for. We don't have
11 any facts like that pleaded.

12 There was some discussion by counsel of the post
13 Rotunda march statements by Mr. Spencer. It begs that he may
14 have said what -- and I think it's Paragraph 175. "We own
15 these streets. We occupy this ground." That begs to question
16 was there a conspiracy? That doesn't prove there was a
17 conspiracy.

18 Where are the allegations that show the
19 communications that command the direction? Now, to the extent
20 there is a statement that Mr. Spencer -- allegation that
21 Mr. Spencer was a leader, it's conclusory. Prove -- excuse
22 me. Plead facts, as I would submit they have to, that shows
23 he was actually leading a conspiracy.

24 With respect to, again, the Thirteenth Amendment,
25 it's adamantly our position there has got to be some

1 implementing legislation on which the claims are based.

2 The Thirteenth Amendment does not create a private
3 cause of action. And to the extent it might be tantamount of
4 saying there is a private cause of action, the case
5 Breckenridge is distinguishable. The right to interstate
6 travel was implicated. That's not implicated here.

7 With respect to Mr. Fields and acts of other people,
8 there is a serious question of foreseeability here. And
9 there's certainly no allegations that I can find that
10 Mr. Spencer or any other individual defendant intended that a
11 vehicle be used to cause great bodily harm or death of
12 anybody. There is nothing in the complaint about that.
13 There's certainly no communications amongst the defendants.

14 THE COURT: It wouldn't make it -- if hypothetically
15 you plan to have, you know, to do violence, you have a
16 conspiracy to commit violence at a particular gathering, it
17 doesn't make any difference how the violence was committed.
18 If somebody did something which was totally unusual, if you
19 planned to commit violence and violence is committed, it
20 doesn't make a lot of difference how it was committed.

21 MR. DiNUCCI: Assuming arguendo that's correct -- and
22 I'm not challenging Your Honor --

23 THE COURT: Right.

24 MR. DiNUCCI: -- the fact remains they haven't
25 pleaded that it was intended that such an act occurred. And

1 they haven't sufficiently pleaded any more broadly that is was
2 intended that violence occurred. There's not any allegation
3 by Mr. Spencer to that effect.

4 So if there is not an allegation that he intended
5 that violence occur, how is he part of a conspiracy that leads
6 to liability for what Mr. Fields did? It's not --

7 THE COURT: I'm saying hypothetically the fact that
8 if there was a conspiracy to hurt, injure the protesters or
9 counterprotesters, it wouldn't make any difference that you
10 maybe thought they were going to use billies and clubs and
11 guns and somebody used a car to run somebody down.

12 MR. DiNUCCI: Well, and I do think -- maybe it's not
13 for today -- there's going to be arguments about
14 foreseeability. What if somebody showed up with an M1 Abrams
15 tank?

16 THE COURT: Well, but if you plan to kill them with a
17 little handgun, a Saturday night special and they got killed,
18 I don't think it would make any difference probably to the
19 victim.

20 MR. DiNUCCI: I'm not going to disagree with that,
21 Your Honor. Let me move on.

22 THE COURT: I don't mean to go on, but I think that
23 generally if you are going to -- you are going to the bank to
24 rob a bank and you don't anticipate, you don't know that
25 somebody has got a gun but they pull a gun and use it, you

1 know, that's part of the conspiracy.

2 MR. DiNUCCI: I understand your point, Your Honor.

3 THE COURT: You could be liable except maybe in
4 Virginia. I think there is an exception.

5 MR. DiNUCCI: Judge, there was some discussion by
6 Ms. Kaplan about -- I think it's Paragraph 78 of the complaint
7 to a reference to a man -- I think it's a man -- who is
8 supposedly a bodyguard for Mr. Spencer. And that was in the
9 context of the discussion about Discord. Again, there is no
10 allegation in the complaint that Mr. Spencer had access to
11 utilize Discord.

12 And the fact that the plaintiffs are referring to
13 this alleged bodyguard of Mr. Spencer is tantamount to a
14 concession they have no evidence whatsoever -- and they
15 haven't pleaded any -- that Mr. Spencer actually used Discord.

16 THE COURT: You need to sum up.

17 MR. DiNUCCI: Lastly, Judge, just a procedural point.
18 There was reference to some demonstrative exhibits, I will
19 call them. I would object to the consideration of anything in
20 those packets because they're outside the complaint.

21 Thank you, Your Honor. I appreciate it.

22 THE COURT: Well, we are looking at the pleadings.

23 MR. DiNUCCI: Understood, Your Honor.

24 THE COURT: Not anything --

25 MR. DiNUCCI: Just being careful. Thank you, Your

1 Honor.

2 THE COURT: Thank you, all. I appreciate your
3 argument.

4 Oh, I'm sorry. I forgot all about you.

5 MR. PEINOVICH: That's okay. It happens. I had a
6 quick --

7 THE COURT: A lot of defendants like that.

8 MR. PEINOVICH: I have one important point I'd like
9 to make. Your Honor correctly asked Ms. Kaplan if it was
10 possible for someone to attend the rally with no intention of
11 being involved in this alleged conspiracy of which the
12 plaintiffs have been begging the question that it even existed
13 at all throughout their pleadings without having sufficient
14 facts to support that, and she said it was.

15 So given that, one of the most important standards
16 that they have to meet in order to survive our motions to
17 dismiss is plausibility. They have to go -- their story has
18 to be more plausible than an alternative explanation for the
19 same facts. And the most obvious alternative explanation for
20 the same facts is that this was a political rally, and
21 political activists were attending the rally.

22 There was nothing that would -- nothing in the facts
23 pled specifically as to me particularly that would indicate I
24 had any intent or was involved any conspiracy. You know, when
25 people plan together or even just talk about plans that other

1 people have made, you know, they're attempting to take that
2 and nudge it up to this line of, you know, credibility. But
3 the fact is that if it's an already planned legal event, which
4 unfortunate events happen and they are sort of post hoc trying
5 to fit this all together in some kind of conspiracy, it
6 doesn't work. And she admitted that there's a possibility
7 that people could attend this rally that had no intent of
8 violence.

9 And given that there's no facts pled that would
10 indicate that specifically me -- and I would argue really
11 anybody -- had this intent, it doesn't survive the motion to
12 dismiss.

13 That's all. Thank you very much, sir.

14 THE COURT: Thank you. All right.

15 Did you have something? Okay. Thank you.

16 Thank you, all. I appreciate your argument and your
17 patience. And I will let you hear something reasonably soon.
18 Thank you.

19 THE MARSHAL: All rise.

20 (Court recessed at 12:56 p.m.)

21
22 CERTIFICATE

23 I, Tracey Aurelio, certify that the foregoing is a
24 correct transcript from the record of proceedings in
25 the above-entitled matter.

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/s/ Tracey Aurelio

Date: May 31, 2018